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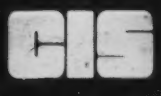

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Calendar No. 980

100TH CONGRESS *2d Session*	SENATE	REPORT 100-542

PROCEDURE FOR THE IMPEACHMENT TRIAL OF UNITED STATES DISTRICT JUDGE ALCEE L. HASTINGS IN THE UNITED STATES SENATE

REPORT

OF THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

TO ACCOMPANY

S. Res. 480

TO CARRY THE IMPEACHMENT PROCEEDINGS AGAINST JUDGE ALCEE L. HASTINGS OVER TO THE 101ST CONGRESS

SEPTEMBER 22 (legislative day, SEPTEMBER 7), 1988.—Ordered to be printed

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CARRYING THE IMPEACHMENT PROCEEDINGS AGAINST JUDGE ALCEE L. HASTINGS OVER TO THE 101ST CONGRESS

SEPTEMBER 22 (legislative day, SEPTEMBER 7), 1988.—Ordered to be printed

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Mr. FORD, from the Committee on Rules and Administration, submitted the following

REPORT

[To accompany S. Res. 480]

The Committee on Rules and Administration reports an original resolution to provide for the Senate to carry the impeachment proceedings against Judge Alcee L. Hastings over to the 101st Congress and recommends that the resolution be agreed to.

PURPOSE

The Committee on Rules and Administration, directed by an order adopted by the Senate on August 9, 1988, to report to the Senate by September 23, 1988, its advice regarding specified procedural matters in the Senate impeachment trial of United States District Judge Alcee L. Hastings, reports thereon with recommendations.

The procedural matters about which the Committee was directed to advise the Senate are: "(a) the authority of the Senate to continue in the next Congress proceedings on the impeachment of Judge Alcee L. Hastings; (b) the appropriate use in the pending impeachment, of Senate Impeachment Rule XI; and (c) any other matter which may assist the Senate in a fair trial of the pending impeachment."

I. INTRODUCTION

In preparing this report, the Committee reviewed precedents of the House of Lords, the United States Senate and the writings of authorities on the subject of impeachment in both England and the

United States. In addition, the Committee requested the parties, United States District Judge Alcee L. Hastings and the Managers on behalf of the House of Representatives (the "House Managers"), as well as the Congressional Research Service of the Library of Congress, to comment on the procedural matters. Each party was then permitted to submit additional comments in response to those made by the other, and also on particular subjects requested by the Committee. The comments of the parties, their responsive statements, and those of the Congressional Research Service are included in this report* along with a statement by Senator Charles McC. Mathias, Jr., who was Chairman of the committee appointed in the impeachment of Judge Claiborne.

After careful consideration of the foregoing, the Committee finds, and advises the Senate, that the Senate has clear authority to continue in the next Congress proceedings on the impeachment of United States District Judge Alcee L. Hastings, and to appoint, pursuant to Senate Impeachment Rule XI [1], a committee to perform the duties and to exercise the powers provided for in the rule. Although the Senate has authority to appoint such a committee before adjournment of this Congress, the Committee recommends that the Senate adopt a resolution to defer further proceedings in the pending impeachment to the 101st Congress; and that this Committee conduct a hearing the week of January 23, 1989, and issue a report on or about February 1, 1989, advising the Senate on the appropriate use of Senate Impeachment Rule XI and on any other matter which may assist the Senate in the fair trial of the pending impeachment.

The Committee further recommends that the Senate direct the parties in the pending impeachment:

(i) to be prepared to proceed with the trial, whether before the Senate or a committee appointed pursuant to Senate Impeachment Rule XI, by March 1, 1989, or as soon thereafter as the Senate may order;

(ii) to make every effort to resolve, to the fullest extent possible, pretrial matters so as to narrow the issue and reduce the number of witnesses through, among other methods, stipulations of facts and of authenticity of documents; and

to this end, that the Senate advise the the parties that it will make the services of the Senate Legal Counsel available to mediate differences.

II. Background of the Impeachment of Judge Alcee L. Hastings [2]

On August 3, 1988, the House of Representatives voted to impeach Judge Alcee L. Hastings, adopted articles of impeachment and appointed the House Managers. The Senate received from the House of Representatives on August 8, 1988, its message advising

*The Committee has taken the liberty of separating their statements by subject and including the individual sections in this report at the appropriate place.

[1] We refer to Rule XI of "Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials" [Revised pursuant to S. Res. 479, 99–2, Aug. 16, 1986].

[2] The portions of the summary concerning events prior to receipt of the message from the House of Representatives on August 8, 1988, are based on the Report of the Committee on the Judiciary, entitled "Impeachement of Judge Alcee L. Hastings", Report 100–810, 100th Congress.

the Senate of the foregoing and, on that same day, adopted an order informing the House that it would be ready on August 9, 1988, to receive the House Managers to present the articles of impeachment.

On that date, the Senate received the House Managers, who presented to the Senate seventeen articles of impeachment against Judge Alcee L. Hastings and demanded that the Senate prepare for the impeachment trial. Following the presentation of the articles by the House Managers, the Senate proceeded with the swearing of its Members and the adoption of S. Res. 456, authorizing the issuance of a summons to Judge Alcee L. Hastings. In that resolution Judge Alcee L. Hastings was ordered to file an answer to the articles of impeachment no later than September 8, 1988, and the House Managers were allowed to file a replication no later than September 23, 1988. The final action taken by the Senate that date with regard to the impeachment was the adoption of the order directing this Committee to report to the Senate by September 23, 1988, "on (a) the authority of the Senate to continue in the next Congress proceedings on the impeachment of Judge Alcee L. Hastings; (b) the appropriate use, in the pending impeachment, of Senate Impeachment Rule XI; and (c) any other matter which may assist the Senate in a fair trial of the pending impeachment."

On December 29, 1981, a grand jury sitting in the Southern District of Florida returned indictments charging Judge Alcee L. Hastings and William A. Borders, Jr., an attorney, with conspiracy and obstruction of justice. After separate trials, Mr. Borders, on March 29, 1982, was convicted on all counts by a jury; and on February 4, 1983, Judge Hastings was acquitted by a jury. On March 17, 1983, a complaint was filed with the United States Court of Appeals for the Eleventh Circuit by William Terrell Hodges, Chief Judge of the United States District Court for the Middle District of Florida, and Anthony A. Alaimo, Chief Judge of the United States District Court for the Southern District of Georgia, alleging misconduct on the part of Judge Hastings. The complaint was initiated under 28 U.S.C. 372(c), the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.

An Investigating Committee consisting of five judges was appointed by the Chief Judge of the Eleventh Circuit and spent approximately three years investigating the allegations, hearing over 100 witnesses and receiving approximately 2,800 exhibits. The Judicial Council of the Eleventh Circuit accepted and approved the unanimous Investigating Committee Report and concluded that Judge Hastings had engaged in conduct which might constitute grounds for impeachment. A certification to that effect was made to the Judicial Conference of the United States on September 2, 1986, which concurred that impeachment may be warranted.

On March 17, 1987, Chief Justice Rehnquist, acting on behalf of the Judicial Conference, transmitted to the Speaker of the House of Representatives a certification that the Judicial Conference had determined that Judge Hastings had "engaged in conduct which might constitute one or more grounds for impeachment." That certification and the Investigating Committee's Report were referred to the Committee on the Judiciary, which in turn referred the matter to the Subcommittee on Criminal Justice.

The Subcommittee held seven days of hearings from May 18, 1988, to June 9, 1988, during which it heard the testimony of twelve witnesses. Judge Hastings was invited to testify, but declined to do so on advice of counsel. Mr. Borders was subpoenaed to testify but refused to do so, asserting various constitutional rights. The Subcommittee decided not to seek immunity and compel Mr. Borders to testify, citing as reasons for this decision Mr. Borders' recalcitrance, the significant delay that would likely result from pursuing his testimony, and the question of his credibility. On July 7, 1988, the Subcommittee unanimously adopted 17 articles of impeachment, introduced as H. Res. 499, which was taken up by the Committee on the Judiciary on July 26, 1988, and adopted, after adoption of a technical and clarifying amendment.

III. The "Authority of the Senate To Continue in the Next Congress Proceedings on the Impeachment of Judge Alcee L. Hastings"

(A) Introduction

The order directing the Committee to file this report by September 23, 1988, was agreed to August 9, 1988, following the adoption of S. Res. 456, which provides for the issuance of a summons. Pursuant to that resolution, Judge Hastings filed with the Secretary of the Senate on September 8, 1988, his answer to the articles of impeachment. The House Managers may file a replication no later than September 23, 1988. If the Senate votes to proceed with the appointment of a committee as authorized by Senate Impeachment Rule XI, the sequence of events would be: (i) the adoption of a resolution authorizing the Presiding Officer to appoint a committee, (ii) the appointment and organization of the committee, (iii) the hearings and proceedings of that committee, and (iv) the issuance of its report to the Senate. Subsequently, the Senate would consider the impeachment, including the hearing of witnesses if it so decided, and vote on each of the articles. If the Senate chose not to appoint a committee, there would remain the conduct of a full impeachment trial by the Senate followed by votes on each of the articles.

There are two aspects to the issue of continuing the impeachment to the next Congress: (a) does the Senate have authority to continue in the next Congress the pending impeachment; and, (b) if it has such authority, is there any legal or procedural restriction or limitation on the point at which the impeachment proceedings in the Senate may be interrupted and continued to the next Congress.

(B) British law

In the 1678 impeachment of Thomas, Earl of Danby, the House of Lords resolved that ". . . the Dissolution of the last Parliament doth not alter the State of the Impeachments brought up by the Commons in that Parliament." [3]

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[3] Costin and Watson, *The Law and Working of the Constitution: Documents 1660–1914*, Vol 1, p. 182 (London, 1952); *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, Vol. pp. 1230–1231 (Howell ed. 1816).

Sir F. Winnington noted that an impeachment ". . . was the cause of the Commons of England, who only change their representatives in a new parliament." [4]

Parliament was confronted with the same issue during the impeachment of Warren Hastings, Governor General of India. Both Houses of Parliament voted that a dissolution of Parliament did not end Hastings' trial. The trial lasted from 1788 until 1795.[5]

(C) United States Law

(1) *In General.* While there is no discussion in the *Federalist Papers* of the issue of continuing an impeachment trial in a subsequent Congress, Jefferson's *Manual* [6] makes it clear that the founders were aware of British practice. Jefferson stated:

> When it was said above that all matters depending before Parliament were discontinued by the determination of the session, it was not meant for judiciary cases depending before the House of Lords, such as impeachments, appeals, and writs of error. These stand continued, of course, to the next session. . . .
>
> *Impeachments stand, in like manner, continued before the Senate of the United States.*

A review of the *Annals of Congress* [7] shows that the members of the First Congress were aware of the Hastings case. During debates on the power of the president to remove lesser executive officials, the Hastings case was mentioned by name. Representative Vining said:

> Witness a transatlantic instance of its [the impeachment process] incompetency—he meant the famous case of Mr. Hastings. With what difficulty was that prosecution carried on! What a length of time did it take to determine!

(2) *Impeachment Cases.* There are numerous impeachment cases in which Congress carried over proceedings from one Congress to the next, most involving cases in which the House continued its inquiries from Congress to Congress. In two cases, those of Judge Pickering and Judge Louderback, Senate proceedings were continued from one Congress to the next.

(a) Impeachment of Judge Pickering (1803–1804)

On March 2, 1803, the House voted to impeach Judge John Pickering.[8] On the following day, which was also the last day of the Seventh Congress, the Senate received the impeachment resolution and referred the matter to a committee which prepared a resolution that was sent to the House.[9]

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[4] *State Trials, Id.* at p. 1521.

[5] Marshall, *The Impeachment of Warren Hastings,* pp. 75–77 (Oxford University Press, 1965). See also Costin and Watson, *The Law and Working of the Constitution, supra,* Vol. 2, pp. 159–160.

[6] Jefferson's *Manual,* § 592, contained in *Rules of the House of Representatives,* H. Doc. 99–279, pp. 287–288 (emphasis added and citations omitted).

[7] *Annals of Congress,* Vol. 1, 373, May 1789 (Gales Ed. 1834). See also *Annals, Id.* 374, May 1789; p. 465, June 1789.

[8] A. Hinds, *Hinds' Precedents of the House of Representatives of the United States,* Vol. 3, § 2319 (Washington, 1907).

[9] Hinds, *supra,* § 2320; *Senate Journal,* pp. 283–285; *House Journal,* p. 392.

The Eighth Congress met in its first session on October 17, 1803. "The proceedings against Judge Pickering were continued from the point where they had been interrupted by the expiration of the Seventh Congress." [10] The House appointed a committee to prepare the articles of impeachment on October 20, 1803.[11]

On January 3, 1804, the Senate committee which had been formed to inquire into further proceedings reported a resolution stating that the Senate could not take notice of the verbal notification delivered by the House in the Seventh Congress and that proceedings could be deferred until written articles were presented. According to Hinds', "It does not appear that the above resolution was formally agreed to by the Senate."[12] On the following day, the Senate resolved itself into a court of impeachment.[13]

(b) Impeachment of Judge Louderback

In the case of Judge Harold Louderback, the House appointed managers of February 27, 1933 (76 Cong. Record. 5177–5178). The articles of impeachment were presented to the Senate on March 3, 1933, the final day of the 72nd Congress. Senator Norris noted that, because of the adjournment, it would be impossible for the Senate to comply with the rule requiring them to proceed with the trial on the next day. By unanimous consent, the Senate resolved to take up the case at 2 o'clock on the first day of the first session of the 73rd Congress. (76 Cong. Record 5473–5476). The Senate, sitting as a court of impeachment, met on March 9, 1933 (77 Cong. Record 47).

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[10] Hinds, *supra*, § 2321.
[11] Hinds, *Id.; House Journal*, p. 411.
[12] Hinds, *supra*, § 2324.
[13] Hinds, *Id.* § 2328; *Senate Journal*, p. 333.

(D) Statement of House Managers [14]

IN THE SENATE OF THE UNITED STATES
Sitting As A Court of Impeachment

In re	)
	)
	)
IMPEACHMENT OF	)
JUDGE ALCEE L. HASTINGS	)

RESPONSE OF THE HOUSE MANAGERS TO THE
AUGUST 10, 1988 LETTER FROM
THE SENATE COMMITTEE ON RULES AND ADMINISTRATION

By letter dated August 10, 1988, the Chairman and Ranking Minority Member of the Senate Committee on Rules and Administration requested the views of the parties to the impeachment of Judge Alcee L. Hastings on (a) the authority of the Senate to continue the pending impeachment proceedings to the 101st Congress; (b) the appropriate use in this case of Senate Impeachment Rule XI; and (c) any other matter which may assist the Senate in preparing for a fair trial.

[14] Submitted by Alan I. Baron, Special Counsel to Managers of the House of Representatives.
Managers of the House of Representatives: Peter W. Rodino, Jr., John Conyers, Jr., Don Edwards, John Bryant, Hamilton Fish, Jr., and George W. Gekas.
Impeachment Trial Staff: Alan I. Baron, Special Counsel; Janice E. Cooper, Assistant Special Counsel; Patricia Wynn, Assistant Special Counsel; Lori E. Fields, Assistant Special Counsel.
House Judiciary Committee Staff Participating in Impeachment Trial Preparation: M. Elaine Mielke, General Counsel; Alan F. Coffey, Jr., Associate Counsel; and Peter Levinson, Counsel.

The House Managers respond as follows.

A. Precedent establishes the United States Senate's authority to continue the impeachment proceedings to the 101st Congress.

The House Managers are ready to proceed with the impeachment trial of Judge Alcee L. Hastings. Our research establishes, however, that the Senate may continue the pending impeachment of Judge Hastings to the next Congress if it so chooses. There is direct Senate precedent establishing this authority. In addition, English parliamentary practice supports the proposition that an impeachment continues from one Congress to the next.

The most recent example of the continuation of a Senate impeachment proceeding to a subsequent Congress occurred in 1933. On the last day of the 72nd Congress, the Managers of the House of Representatives presented to the Senate an impeachment resolution and articles of impeachment for Judge Harold Louderback. The same day, the Senate resolved that Judge Louderback's impeachment would be a special order of business on the first day of the first session of the next Congress. One week later, on March 9, 1933, the 73rd Congress convened. The Senate then proceeded with the pending impeachment.[1]

When the House Managers presented the resolution impeaching Judge Louderback, the Senate did not express any concern regarding the propriety of continuing the impeachment proceedings in the next Congress. The only debate following the presentation of the resolution focused on whether the impeachment proceedings should be deferred to the first day of the first session of the next Congress, even if the first session was a "special session" called by the President to consider specific legislation.[2]

Further precedent for continuing Senate impeachment proceedings from one Congress to the next is found in the impeachment of Judge John Pickering. On March 3, 1803, the last day of the 7th Congress, the House of Representatives presented to the Senate the resolution impeaching Judge Pickering. At that time, the House of Representatives had not yet drafted articles of impeachment. During the 8th Congress, the House adopted and presented to the Senate the specific articles of impeachment. The Senate then proceeded with Judge Pickering's trial.[3]

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[1] See 6 C. Cannon, Cannon's Precedents of the House of Representatives of the United States, sections 515, 516 (1936).

[2] See Proceedings of the United States Senate in the Trial of the Impeachment of Harold Louderback, U.S. District Judge for the Northern District of California, S. Doc. No. 73, 73rd Cong. 1st Sess., 9-12 (1933).

[3] See 3 A. Hinds, Hinds' Precedents of the House of Representatives of the United States, sections 2319-2321 (1907).

The Senate's authority to try an impeachment case in a subsequent Congress is not affected by the fact that some months may pass between the presentation of the resolution of impeachment and the commencement of trial. In the Pickering impeachment over a year elapsed between the original presentation of the impeachment resolution and the Senate trial. The House presented the resolution to the Senate on March 3, 1803. The House Managers exhibited the articles of impeachment to the Senate on January 3, 1804. The Senate conducted Judge Pickering's impeachment trial between March 6-9, 1804. On March 12, 1804 the Senate voted to convict Judge Pickering on all articles.[4]

The continuation of impeachment proceedings to a subsequent Congress is also consistent with English parliamentary law. Alexander Hamilton noted in The Federalist No. 65 that the Framers of the Constitution modeled the American impeachment process on English precedent. That precedent establishes that impeachment proceedings are not discontinued by the dissolution of Parliament. Constitution, Jefferson's Manual and Rules of House of Representatives, H.R. Doc. No. 279, 99th Cong., 2d Sess., section 620 (1987).

The House of Lords first faced the issue of whether impeachment proceedings may be continued from one Parliament to the next when Charles II dissolved parliament after the House of Commons impeached the Earl of Danby in 1678. In the next Parliament, the House of Lords held that the impeachment resolution was still in effect. J. Hatsell, Precedents of Proceedings in the House of Commons 194-196 (1818). The House of Commons also impeached Lord Stafford in 1678. In 1680, during the next Parliament, the House of Lords proceeded with Lord Stafford's trial. Id. at 212-217.

Subsequently, the House of Lords reversed and annulled this precedent. Over opposition voiced by the House of Commons, in 1685 the House of Lords resolved that the pending impeachments of Lord Danby and four other Lords were no longer in effect. Id. at 217. Later, however, the House of Lords returned to its prior position. In the impeachment case of the Earl of Oxford in 1717 the House of Lords passed a resolution to the effect that prorogation of the Parliament did not put an end to a pending impeachment. L. Pike, A Constitutional History of the House of Lords 234 (1894). Subsequently during the impeachment of Warren Hastings, which was in progress when the Framers met to put together a plan of government in Philadelphia in 1787, and the impeachment of Viscount Melville in 1805, the House of Lords determined that a dissolution of parliament will not bring an

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[4] Id.

impeachment to an end, and passed specific legislation to that effect. Id. See also F. Maitland, The Constitutional History of England 318 (1977).

The American and English precedent for continuing an impeachment proceeding, if the Senate so chooses, from one Congress to the next is also consistent with the continuing nature of the Senate. The Senate, unlike the House of Representatives, may in certain situations exercise the authority to continue a matter from a previous Congress. The Senate has been viewed as a "continuing body" in that at least two thirds of its members (more than a quorum) always held over from one Congress to another. Senate Rule XXV authorizes committees to "continue and have the power to act until their successors are appointed."

"The Senate can and does order investigations, interim reports, final reports and recommendations by its committees, without reference to the ending of one Congress or the beginning of another. This procedure is not affected even where there is some change in the composition of the committee membership." Knowland (Senate Parliamentarian), Senate Rules and the Senate as a Continuing Body, p.16 (quoted in Committee on Rules and Administration of the United States Senate, 93rd Cong., 2d Sess. Impeachment, Miscellaneous Documents 67 (Comm. Print 1974).

This authority was recognized by the Supreme Court in McGrain v. Daugherty, 273 U.S. 135, 181 (1926), in which it was held that the subpoenas issued by a Senate committee in a previous Congress were not moot in view of the special nature of the Senate:

> [T]he Senate . . . is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one third only become vacant at the end of each Congress, two thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.
>
> Mr.Hinds in his collection of precedents, says: "The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress;" and, after quoting the above statement from Jefferson's Manual, he says: "The Senate, however, being a continuing

body, gives authority to its committees during the recess after the expiration of a Congress." (Footnotes omitted)

Thus precedent supports the Senate's inherent authority to continue the pending proceedings on the impeachment of Judge Alcee L. Hastings to the 101st Congress. If the Senate exercises its authority, the House Managers request that the present Senate continue to conduct the proceedings in an expeditious manner. A timely resolution of the pending impeachment proceeding is in the interests of the parties, the Senate, and the public. The House Managers therefore urge the Senate to proceed either through the appointment of a Rule XI committee or as a full body with the consideration and resolution of pretrial motions during the next few months, a procedure which clearly is permitted under Senate rules and practice. Ibid. In this way the parties can prepare for trial without numerous issues remaining unresolved. The taking of testimony can therafter commence when the matter is taken up in the 101st Congress.

(E) Statement of Judge Alcee L. Hastings [15]

September 6, 1988

To: THE COMMITTEE ON RULES AND ADMINISTRATION OF THE UNITED STATES SENATE

Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Authority of the Senate to Conduct a Trial in the 101st Congress on the Articles of Impeachment Exhibited By the House of Representatives in the 100th Congress.

This memorandum develops three points:

1. The Senate has the authority to carry forward articles of impeachment exhibited in one Congress to the next Congress. The Constitution designates the Senate as the court of impeachment and assigns it the exclusive judicial power to try impeachments. As in any other court, judicial business which is not finished in one term may be carried forward to the next.

2. The only limitations on this authority are functional and stem from the unique nature of the court. The members of the Senate sit both as judges to determine the law and as jurors to determine the facts. For that reason, proceedings that will require decisions by the Senate that may affect the outcome of a case should only be undertaken in a Congress in which the case may fairly be tried to completion.

3. The application of these principles in the present case seems clear. The pleadings and the recommendations by the Committee on Rules and Administration may appropriately be submitted in this Congress. The case should then be deferred until the Senate has been constituted and has organized itself at the outset of the 101st Congress. It should be the function of the Senate as then constituted and organized, the Senate that will decide the case, to make any significant decisions concerning the conduct of the trial that may be required, to establish finally the procedures by which the case will be heard and decided, and to resolve such pre-trial motions and other questions as may then come before it.

[15] Submitted by Counsel for United States District Judge Alcee L. Hastings: Terence J. Anderson, c/o The University of Miami, School of Law, Coral Gables, Florida 33124-8087 (305) 284-2971.

1.

The framers understood that the power to try impeachments was a judicial power.[1] They debated whether it should be assigned to the Supreme Court, the Senate, or some specially created body.[2] They selected the Senate, recognizing that that assignment represented a departure from a pure separation of powers ideal.[3] In early cases, the Senate explicitly designated itself as a court when it tried an impeachment.[4]

The framers adopted the constitutional process of impeachment by the House and trial by the Senate from the practice that existed in the English parliament. Insofar as the record shows, they intended to adopt the process as it existed with only three substantial changes:

-- they limited the class of persons who could be impeached to "the President, the Vice President, and all civil officers of the United States . . .";[5]

-- they imposed a higher standard for conviction by requiring "the Concurrence of two thirds of the Members present;"[6] and

-- they confined the Senate's power to impose punishment to "removal from Office, and disqualification to hold and enjoy any other Office of honor, Trust or Profit under the United States . . . ."[7] They otherwise appear to have intended that the practice in the trial of impeachments be consistent with the practice in the House of Lords as it had evolved.[8]

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1 See, e.g., The Federalist No. 65 (Hamilton), 439 (Cooke ed. 1961).

2 See, e.g., id. at 441-44; 1 Farrand, The Records of the Federal Convention of 1787, 232, 244.

3 See, e.g., The Federalist No. 66 (Hamilton), 445-46; cf. 2 Story, Commentaries on the Constitution, 214-50 (Boston: 1833).

4 During the earliest trials, the Senate records are replete with references to the Senate as the High Court of Impeachment. See, for collected examples, Extracts from the Journal of the United States Senate in all Cases of Impeachment: 1799-1904 ("Extracts"), S. Doc. 876, 62d Cong. 2d Sess., (1912) (references throughout records of first eight impeachment trials).

5 U.S. Const., art. II, § 4.

6 Id., cl. 6.

7 Id. art. I, § 3, cl. 7.

8 See, e.g., The Federalist No. 65 at 440; 2 Story at 216, cf. Berger, Impeachment: The Constitutional Problems, 170-72 (1973).

The House of Lords first considered the effect that a dissolution of parliament had on pending impeachments in 1679. At that time, it adopted a resolution that all judicial business, including impeachments, continued from parliament to parliament.[9] The English practice was confirmed in 1791, shortly after the Constitution was adopted, in the impeachment of another Hastings.[10] The latter event does not appear to have provoked surprise or concern in this country.

The authority to continue unfinished business would, in any event, appear to have been contemplated as inherent in the designation of the Senate as a court. At the time the Constitution was adopted and for a considerable time thereafter, courts sat for defined terms and had confronted the question of what happened when a case was not completed by the end of the term in which it was filed. The rule that unfinished cases carried over from term to term was well established when the Constitution was adopted[11] and was routinely followed thereafter.[12] Against that background, it is not surprising that the Senate scheduled the trial of Judge Louderback to begin in the Congress after the Congress in which the House had exhibited its articles of impeachment, with no debate over its authority to do so.[13]

The conclusion that the Senate must have the authority to carry forward articles of impeachment beyond the Congress

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9 See P.J. Marshall, The Impeachment of Warren Hastings (Oxford 1965) (for a summary and citations to the Journal of the House of Lords).

10 Id.

11 See, e.g., 3 Blackstone's Commentaries,* 275-78 (Tucker ed. 1803); 1 Archbald, The Practice of the Court of King's Bench, 36 (1919); 9 Will. 3, c.15 s.2 (1697).

12 See, e.g., Sutherland, Judicial Administration, 50-51 (2d ed. 1948). The courts rarely had occasion to discuss this principle because the cases arose on questions concerning an attempt by a party to reopen a case decided in a prior term. See, e.g. Bank of United States v. Moss, 47 U.S. (6 How.) 31, 37 (1848) (distinguishing general rule from case before the court), cf. Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 508-09 (1869) (applying principle in related context without discussion).

13 Proceedings of the United States Senate in the Trial of Impeachment of Harold Louderback, 9-12 (1933). That was not the first case in which the Senate had carried an impeachment forward. On the last day of the Seventh Congress, the House notified the Senate that Judge Pickering had been impeached, and the Senate took order, although formal articles were not exhibited until later. The Senate took the matter up early in the Eighth Congress. Extracts 17-18. See also, notes following Jefferson's Manual, § 620 in Constitution, Jefferson's Manual, and Rules of the House of Representatives, H. Doc. 603, 95th Cong. 2d Sess., 287 (1979).

in which they are exhibited is compelled by a cursory analysis of the consequences which would follow from the opposite view. The House may often exhibit articles late in a Congress, as it did in *Louderback* and has here. If the Senate did not have the authority to carry the articles forward to a subsequent Congress, it would be placed in an untenable position. The House would have power to restrict the power of the Senate to establish procedures it thought necessary for a fair trial and to control its own proceedings. Moreover, the rights of the accused would be effectively placed at the mercy of the prosecutor. For example, could the House exhibit articles one day before the end of a Congress, as it did in *Louderback*, and insist that the accused respond and the Senate conduct the trial on the following day? That could not have been the intent of the framers and cannot be the meaning of the Constitution.

2.

The trial of any impeachment should be initiated, conducted, and decided in the Senate during the same Congress, absent extraordinary circumstances. The Senators are responsible for deciding both questions of law and questions of fact. The accused is entitled to have his rights determined by the same court. Under the Constitution, both the presiding officer and as many as one-third of the members may change in the transition from one Congress to the next. Basic principles of due process and sound judicial administration dictate that the judges and jurors that undertake to hear a case should remain the same throughout the proceedings, absent extraordinary and unforeseeable occurrences.

The concern here is pragmatic as well as theoretical. A case may well be shaped by the early motions, and the ultimate disposition may be substantially affected by the arguments made in earlier phases. In a criminal trial, a motion to dismiss the indictment may be denied, but the arguments may alert the judge to flaws that are potentially crucial and shape his or her views on the evidence as it is offered and finally on the likely outcome. So too, an opening statement not only orients the jury to the evidence it may expect, but also alerts them to theories they may see developed as the case unfolds and thus enables them to view the evidence in context. Just as the courts do not routinely substitute judges and cannot add new jurors after a trial has begun, so too the Senate should not have a change in its composition during the period when it may be called upon to hear

arguments and make decisions that may affect the outcome of the case.

3.

The application of these principles to the present case appears straightforward enough. The Senate should not be called upon to make any decisions that might govern the trial or affect its disposition during closing days of the present Congress. The Senate has followed its customary practices with respect to the pleadings, and has given the House managers until September 23, 1988, to file the House's replication to Judge Hastings's answer. It has also asked this Committee to report on that date. Counsel for Judge Hastings understand that Congress intends to adjourn on October 5, 1988, or as soon thereafter as possible. Thus, the Senate is likely to have less than ten days to consider the Committee's report and recommendations before Congress adjourns, and these days are likely to be consumed with budget and other issues that must be resolved. That is not a period when the Senate could properly deliberate upon and decide substantial issues that may affect the course of the trial in this case.

The Committee should report that the Senate has the authority to carry the articles of impeachment forward to the 101st Congress. The Committee should recommend that Senate exercise that authority and defer further consideration of the articles of impeachment exhibited by the House until the Senate has organized itself in the 101st Congress. In order to give guidance to the House managers and Judge Hastings's counsel, the Committee should suggest that the Senate set a date, at least tentatively, when the Senate will reconvene as a court of impeachment for further proceedings.

(F) House Managers' Response to Judge Hastings' Statement [16]

REPLY OF THE HOUSE MANAGERS TO THE
SEPTEMBER 8, 1988 LETTER FROM
THE SENATE COMMITTEE ON RULES AND ADMINISTRATION

By letter dated September 8, 1988, the Chairman and Ranking Minority Member of the Senate Committee on Rules and Administration requested that each of the parties respond to the memoranda filed by the other party on September 6, 1988. Specifically, the Committee requested that the House Managers comment on Judge Hastings' second statement in favor of a full Senate trial, his suggestion regarding pretrial discovery, Judge Hastings' position on what action the Senate can legitimately undertake during the 100th Congress, and on any other matter which would be helpful to the Committee.

The House Managers respond as follows.

III. Matters Which May Be Considered in the 100th Congress

Assuming that the actual taking of testimony will not occur until after the convening of the 101st Congress, the present Senate can decide preliminary motions between now and the beginning of the next Congress. There are two methods for achieving this result, both of which would ensure the expeditious completion of the pending impeachment proceedings. During the 100th Congress, the Senate could appoint a special committee, independent of Rule XI, to decide pretrial issues with a right of appeal to the full Senate. In the alternative, the present Senate could appoint a Rule XI Committee and vest it with the authority to decide

[16] The parties were invited, by Senate Rules Committee letter dated September 8, 1988, to respond generally to the comments of the other, as well as to specific matters set forth in the letter. (See Appendix for the letter of September 8, 1988.) See also footnote 14.

pretrial matters. The goal of either committee would be to complete all pretrial matters prior to the beginning of the 101st Congress, although the jurisdiction of either committee could extend to the next Congress. Either of these procedures would facilitate preparation for trial. Moreover, either procedure would have the salutary effect of permitting whatever body is chosen to hear the evidence to begin immediately with the taking of testimony in the 101st Congress.

Judge Hastings argues that if the Senate in the 101st Congress will ultimately vote on the 17 Articles of Impeachment, it violates fundamental notions of due process to have any body created out of the 100th Congress, be it a Rule XI Committee or a specially appointed committee, to rule on pretrial matters that may affect the ultimate outcome of the proceedings. This is clearly not the case. The Senate, unlike the House, is a continuing body and therefore the action taken during one Congress carries over to the next.[34] Moreover, in an analogous situation -- the federal judicial system -- pretrial decisions are often made by someone other than the ultimate trier of fact. For example, United States District Courts refer pretrial motions, both procedural and substantive, to Magistrates. Just as the Senate has the authority to review the decisions of a committee, so the United States District Court has the power to review and reverse a Magistrate's decision. Furthermore, some United States District Courts use rotating dockets, whereby one judge of the district court may hear and decide pretrial motions -- including motions to dismiss and for summary judgment -- while another judge may preside at trial. These procedures, which are employed throughout the United States, do not violate due process.

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[34] See House Managers' Response at 4-5.

(G) Judge Hastings' Response to House Managers' Statement [17]

September 15, 1988

To: THE COMMITTEE ON RULES AND ADMINISTRATION OF THE SENATE OF THE UNITED STATES

Comments on Behalf of United States District Judge Alcee L. Hastings on the Views Expressed by the House Managers in their Memorandum Submitted on September 6, 1988

In Judge Hastings's view, the Rules Committee and the Senate should consider the following points in assessing the views expressed in the memorandum submitted by the House managers on September 6, 1988.[1]

1. The views urged by the managers ask the Senate to accept speed and efficiency as the dominant values to be observed in establishing procedures for the trial of this impeachment. Those views are premised upon a radical conception of the nature of the proceedings that cannot be reconciled with the Constitution or its history. Constitutional proceedings for the impeachment and trial of a judge are *not* analogous to administrative proceedings for the removal of a clerk under the federal civil service system.[2] Impeachment and trial *are* a species of criminal proceedings, and the framers made it clear that there are differences between a retrial of a party previously convicted and that of a party previously acquitted.[3] The impeachment of an ac-

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1. Response of the House Managers to the August 10, 1988 Letter from the Senate Committee on Rules and Administration [hereinafter cited as "Managers Mem."]

2. Managers Mem. at 8 (impeachment merely the first step in a remedial process to remove unfit officers).

3. The managers cannot profess ignorance of the differences. The point and authorities were developed in submissions made on behalf of Judge Hastings throughout the House inquiry. See, e.g., Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary of the House of Representatives Pursuant to H. Res. 128 Impeaching Alcee L. Hastings, Judge of the United States District Court for the Southern District of Florida, of High Crimes and Misdemeanors, Ser. 11, 100th Cong., 2d Sess. [hereinafter "Hearings"], Appendix III (Submissions by Judge Hastings) [hereinafter "App. III"] at 306-07 (practical distinction recognized as fundamental by conservative columnist James J. Kilpatrick), 417-25 (arguments on constitutional principle and policy summarized), 431-36

[17] See footnotes 15 and 16.

quitted judge on accusations that were unanimously rejected by a jury is fundamentally different than the impeachment of a convicted judge on accusations that were unanimously accepted by a jury.[4] The Senate should reject the managers' views on this ground alone. Fairness to the accused and adherence to constitutional principle must be the dominant criteria in establishing procedures for the trial of this impeachment.

2. The managers' suggestions urging streamlined procedures and prompt disposition in the trial of this impeachment must also be assessed against the backdrop of the proceedings that preceded their present call. At the time the House initiated its inquiry, it had unprecedented advantages. It had the benefit of the evidence developed by the Justice Department and the FBI during the eighteen-month investigation that preceded the 1983 trial. It had the benefit of the record of the 1983 trial, at which Judge Hastings confronted his accusers and their evidence and made good his defense, as well as the record from the trial of the alleged co-conspirator, William Borders. It had the benefit of the record developed by a five-judge committee and its retained investigators over a three-and-a-half year period to re-marshall the evidence against the judge, in view of the evidence he had presented at the 1983 trial. It had the benefit of the analysis of that record submitted by Judge Hastings's counsel identifying flaws in the work of the five-judge committee and redeveloping the judge's defense in light of that work.[5]

3. With those advantages in hand, the House authorized its committee to retain special counsel and supporting staff to inquire further. The House committee allowed special counsel and his staff, armed with the House's subpoena power, a year to conduct such *ex parte* investigations, interviews, and depositions as seemed necessary to develop and re-marshall the evidence still a third time. Exacting thor-

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(supporting authorities presented and summarily developed). The point and supporting argument will be developed fully for the Senate in support of appropriate pretrial motions.

4. See authorities cited, id.; compare Managers Mem. at 7 (bald assertion to contrary).

5. reproduced Hearings App. III, 58-243.

oughness was the dominant criterion for the proceedings throughout that seven-year period. Speed and efficiency did not emerge as matters of significant concern until the special counsel had completed his *ex parte* inquiry and prepared his three-volume statement of information[6]. Then and only then did the need for speed and efficiency become criteria that justified overriding procedural protections that considerations of fairness to the accused had mandated in previous inquiries.

4. The need for the Senate to establish procedures that assure an orderly trial that fully protects the rights of the accused is enhanced in this case because the House committee's use of speed and efficiency as its criterion has already deprived Judge Hastings of the protections customarily afforded the accused in inquiries conducted by the House.[7] In that inquiry the House subcommittee denied Judge Hastings the right to confront, in that forum, most of the witnesses whom the managers now anticipates calling to testify against him in the Senate. It chose instead to rely largely upon secondary accounts of evidence others had collected and heard. The House subcommittee also declined to call witnesses Judge Hastings thought necessary to develop evidence in his defense. Throughout, the House has denied Judge Hastings access to materials necessary to enable him to prepare his defense. With the products of investigations spanning seven years in hand, and having itself taken more than a year to prepare the case for the prosecution, it is simply unconscionable for the House managers to now suggest the Senate should sidestep the traditional procedures established to protect the accused so that the case may be promptly heard and decided.

5. In light of this background, the Rules Committee should simply report that the Senate has the authority to

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6. Hearings, Appendix II (Statement of Information).

7. Again the House managers cannot profess ignorance. Throughout the inquiry and at the subcommittee hearings, Judge Hastings requested that the House subcommittee apply the procedures established by precedent and rule with appropriate citations to authority. See, e.g., Hearings App. III at 1-30 (history of pre-hearing phase of inquiry summarized in context), 31-57 (correspondence exchanged during pre-hearing phase), 244-50 (further submission on procedure in light of procedures adopted for hearings).

continue the proceedings to the 101st Congress and recommend that it do so. The House's decision to exhibit articles late in this Congress has already precipitated attempts in the Senate to resolve fundamental issues on a schedule that has not afforded adequate time for research and deliberation. That decision did make it necessary that the Senate promptly confirm that it has authority to carry the case forward. That authority having been confirmed, however, the Senate need not and should not undertake to resolve other fundamental issues in the closing days of this Congress. There is no need, and, for that reason, there can be little justification for attempting to resolve fundamental issues on a time-table dictated by the House that virtually assures hastily and inadequately considered results. In any event, the procedures appropriate for the trial of this case can be better assessed when the pleadings and motions necessary to pose and develop those issues in an appropriate context are before the Senate.

6. By its decision to exhibit the articles when it did, the House has already imposed upon the Senate's prerogative to control its own proceedings. That imposition has resulted in a further imposition: In order to satisfy the schedule made necessary by the House, the Rules Committee was forced to call upon counsel for Judge Hastings to engage in accelerated briefing during the period allotted by the Senate for the preparation of his answer. This House has imposed enough. The Senate should not permit it to impose further. The case should be deferred until the 101st Congress has convened.

7. As a practical matter, the Senate has no real choice; no valid action *can* be taken in these proceedings between the date on which the 100th Congress adjourns and the date on which the 101st Congress convenes. That conclusion stems from the nature of the House, not the Senate. The House is *not* a continuing body, and upon the adjournment of the 100th Congress, the terms of *all* members of the House will expire.[8] For that reason, the present House has no authority to act, and cannot appoint managers with authority to act on its behalf, after the term of its existence has expired.[9] Upon adjournment of the 100th Congress,

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8. U.S. Const., art. I § 2, cl. 1.

9. See, e.g. 4 Hind's Precedents § 4545 ("Committees may by the House be empowered to sit during a recess that is within the terms of the Congress, but not af-

there will be no one who can properly exercise the powers of the House until the 101st Congress has convened and a reconstituted House has appointed or reappointed managers to act on its behalf in these proceedings. It is equally clear that the Senate may not take or authorize actions in an impeachment proceeding when the House is not in session, notwithstanding the Senate's status as a continuing body.[10] The submissions by the managers on these points merely illustrate the kind of willingness to disregard principle and precedent that marked the proceedings in the House.

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ter the expiration of the term"); compare Mc Grain v Daugherty, 273 U.S. 135, 181-82 (noting distinction between Senate, as a continuing body, and the House "whose members are all elected for the period of a single Congress").

10. See, e.g. Jefferson's Manual, § 616; 3 Hind's Precedents § 2006. The constitutional bar takes on practical import in the present case. Chairman Rodino effectively managed the proceedings in the House and is the senior manager representing the House before the Senate. Chairman Rodino has announced his retirement and will not be a member of the House that serves in the 101st Congress. It would thus be particularly inappropriate to require the Senate to rule upon positions presented by a manager who cannot serve in that capacity at trial. The House, as constituted and organized in the 101st Congress, should determine who shall represent it before the Senate in all proceedings in this impeachment.

(H) Comments of Congressional Research Service [18]

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

August 30, 1988

TO : Senate Committee on Rules and Administration
Attn: Jack Sousa

FROM : American Law Division

SUBJECT : Procedural Questions Relating to Impeachment of Judge Hastings

This memorandum is submitted in response to the committee's request, as discussed with Mr. Sousa of the committee staff, for research concerning two procedural questions related to the impeachment of Judge Alcee Hastings. At the request of Senator Byrd, the Committee was directed to report to the Senate as to these two matters.[1] The questions are "(a) the authority of the Senate to continue in the next Congress proceedings on the impeachment of Judge Alcee L. Hastings; [and] (b) the appropriate use, in the pending impeachment, of Senate Impeachment Rule XI...."[2]

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[1] 134 Cong. Rec. S 11170 (daily ed. August 9, 1988).

[2] Id. Although the focus of this memorandum is on the questions posed by Senator Byrd, it should be noted that the Senate may have considerable latitude in ruling on procedural matters related to impeachment because such determinations by the Senate are arguably not subject to judicial review. Ritter v. United States, 84 Ct. Cl. 293 (1936), cert. denied, 300 U.S. 668 (1937). For differing views with regard to the availability of judicial review to the respondent in impeachment proceedings, compare Goldstein, "The Effect of the End of a Congress and Start of a New Congress on a Pending Impeachment Proceeding: Judicial Review of These Questions," reprinted in Impeachment: Miscellaneous Documents at 169-206 (Comm. Print 1974) with Berger, Impeachment 103-21 (1973).

[18] Submitted on August 30, 1988, by Jay R. Shampansky, Esq., Legislative Attorney, American Law Division, Congressional Research Service, The Library of Congress, Washington, D.C. 20540.

CONTINUATION OF PROCEEDINGS IN NEXT CONGRESS

The authority of the Senate to continue impeachment proceedings against Judge Hastings in the 101st Congress would seem to be supported both by precedent and the fact that the Senate is a continuing body. However, our research has revealed no instance in which the Senate has begun taking testimony in the trial in one Congress and concluded the trial in the next Congress.

Section LIII of Jefferson's Manual states that "an impeachment is not discontinued by the dissolution of Parliament, but may be resumed by the new Parliament." In 1678, after Lord Danby was impeached by the House of Commons, the King dissolved Parliament. Nevertheless, the House of Lords ruled that the charges "continue, and are to be proceeded on, in status quo, as they stood at the dissolution of the last Parliament, without beginning de novo; and that the dissolution of the last Parliament doth not alter the state of the impeachments brought up by the Commons in that Parliament."[3]

In this country, Judge John Pickering and Judge Harold Louderback were impeached by the House in one Congress and tried by the Senate in the next Congress. In the Pickering case, a House resolution impeaching the judge was carried by a House committee to the Senate on March 3, 1803, the last day of the 7th Congress. The Senate was informed by the House committee that Pickering had been impeached and that the House would "in due time exhibit particular articles of impeachment against him...."[4] (As is explained in Deschler's Precedents of the U.S. House of Representatives,[5] "the practice at

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[3] Costin and Watson, 1 The Law and Working of the Constitution: Documents 1660-1914 at 182 (1952), quoted in Goldstein, "The Effect of the End of a Congress on a Pending Impeachment Proceeding," reprinted in Impeachment: Miscellaneous Documents at 25, 32 (Comm. Print 1974) (hereinafter cited as Goldstein I).

The decision in Danby's case concerning the continuation of impeachment proceedings was revoked in 1685 for "strictly political purposes", but was reinstated in the impeachment trial of Warren Hastings in 1791. Goldstein I at 33.

[4] III Hinds' Precedents of the House of Representatives § 2320.

[5] Vol. 3, ch. 14, § 4 at p. 467.

the time of the Pickering impeachment was to present a resolution of impeachment to the Senate and then to prepare and adopt articles of impeachment for presentation to the Senate.") When the 8th Congress met in October, 1803, proceedings in the House against Pickering "were continued from the point where they had been interrupted by the expiration of the 7th Congress."[6] The House agreed to articles of impeachment and appointed managers and the Senate organized for and conducted the trial.[7]

According to Deschler's Precedents, the only other instance in which impeachment proceedings were continued into a new Congress was in the case of Judge Louderback. "On March 3, 1933, the last day of the 72d Congress, the managers on the part of the House....appeared before the Senate and read the resolution and articles of impeachment. The Senate adopted a motion that the proceedings be made a special order of business on the first day of the first session of the 73d Congress."[8] Professor Stephen Goldstein, who has studied the effect of the end of a Congress on a pending impeachment,[9] concluded that these precedents "establish the proposition that termination of a Congress does not require impeachment proceedings then pending in the House to begin anew in a new House."[10] However, the new House generally must adopt a resolution

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[6] III Hinds' Precedents § 2321.

[7] Id., § 2322; Deschler's Precedents, supra, at p. 468

[8] Deschler's Precedents, supra, at p. 468; VI Cannon's Precedents of the House of Representatives § 515.

[9] Goldstein, a professor at the University of Pennsylvania Law School, was commissioned by Senator Tower in 1974 to prepare several studies concerning impeachment, and the papers were provided by Tower to the Senate Committee on Rules and Administration, which published them as a committee print. See Impeachment: Miscellaneous Documents, supra note 3, at p. iii.

[10] Goldstein I, supra note 3, at 61.

authorizing committees, etc., to continue the impeachment proceedings in the new Congress.[11]

One related precedent, in addition to that of Pickering and Louderback, might be noted. The report of the House Judiciary Committee in the 74th Congress, recommending the impeachment of Judge Halsted Ritter, relied on evidence taken by the committee in the previous Congress pursuant to a resolution that authorized an investigation of the judge. The House in the 74th Congress adopted a resolution and articles of impeachment against Ritter.[12]

Both the Pickering and Louderback cases indicate that the House can vote to impeach in one Congress and the Senate can conduct the trial in the following Congress. Goldstein, after a review of English and American precedents and the effect of adjournment on other types of pending Senate proceedings, concluded that "the pre-evidentiary trial parts of the Senate impeachment process are not affected by the end of one Congress and the beginning of the next."[13] Goldstein defined the "pre-evidentiary trial parts" of the Senate proceedings so as to include receiving the House announcement of the impeachment vote and the articles of impeachment, taking the impeachment oath, summoning the respondent, granting the respondent time in which to answer, and the filing of a replication and preliminary statements.[14] The conclusion that the start of a new Congress has no effect on Senate impeachment proceedings that occur before evidence is received would seem to be supported

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11 Id. at 62.

12 Deschler's Precedents, supra, chapter 4, §§ 4.3, 4.4, and 18.4.

13 Goldstein I, supra note 3, at 74.

14 Id. at 65.

by the fact that the Senate is generally viewed as a continuing body.[15] The Senate in its rules explicitly notes that its rules "shall continue from one Congress to the next Congress unless they are changed as provided" in the rules,[16] and Senate committees are "appointed at the commencement of each Congress, and shall continue and have the power to act until their successors are appointed...."[17] Nevertheless, there seem to be certain exceptions in Senate procedure to the principle that the Senate is a continuing body. For example, neither the legislative business of the Senate[18] nor pending presidential nominations carry over from one Congress to the next.[19] And although treaties can remain pending before the Senate from one Congress to the next,[20] according to the rules, "all proceedings on treaties shall terminate with the Congress, and they shall be resumed at the commencement of the next Congress as if no proceedings had previously been had thereon."[21] Goldstein has argued that "prior Senate practice, although scanty,...supports the view

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15 McGrain v. Daugherty, 273 U.S. 135, 180-82 (1926); Riddick, Senate Procedure, S. Doc. No. 97-2, 97th Cong., 1st Sess. 991 (1981).

16 Senate rule V, cl. 2.

17 Senate rule XXV, cl. 1.

18 Senate rule XVIII specifies that legislative business carries over from one session of a Congress to another session of the same Congress.

19 The rule with regard to nominations is even more restrictive than that governing bills, stating that nominations that have not been confirmed or rejected during the session at which they were made cannot be acted upon without again being submitted by the President to the Senate. Senate rule XXXI, cl. 6.

20 Senate rule XXX, cl. 2. "Treaties, unlike any other business considered by the Senate, stay before that body once they are submitted by the President until the Senate has acted thereon or unless the President requests, and/or the Senate adopts an order or resolution authorizing their return to the President or the Secretary of State." Riddick, supra note 15 at 1049.

21 Senate rule XXX, cl. 2.

that the end of an old Congress and beginning of a new Congress does not effect impeachment proceedings in the Senate preliminary to the evidentiary trial."[22] Support for this statement is found in the fact that, in the Louderback case, articles of impeachment were presented by the House to the Senate on the last day of a Congress. The Senate postponed the impeachment oath and the trial until the following Congress.[23] It may also be relevant that in several impeachment cases, several Senators took their seats and were sworn after the Senate took the impeachment oath, but before testimony was taken. In some of these cases, the new Senators participated in the trial and voted in the matter.[24] Arguably, if one or more individual Members can participate in the trial although they were not present during some of the proceedings before testimony was taken, then the trial could be postponed to a new Congress and be conducted before a body composed in part of Members newly-elected to the Senate, who had not participated in the pre-evidentiary trial proceedings in the previous Congress.

If impeachment proceedings are continued by the Senate from one Congress to the next, certain problems may arise. Goldstein identified two such problems and explored their contours in some detail.[25] The first such problem, according to Goldstein, relates to the possible disqualification of a newly-elected Senator in the new Congress who had participated in impeachment

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22 Goldstein I, supra note 3, at 71.

23 See text accompanying note 8, supra. See also Goldstein I, supra note 3, at 71-72.

24 See precedents cited in Goldstein I, supra note 3, at 72-74.

25 See Goldstein, "The Effect of the End of a Congress on a Pending Impeachment Proceeding: The Senate Trial," reprinted in Impeachment: Miscellaneous Documents, supra note 3, at 81-168 (hereinafter cited as Goldstein II).

proceedings against the respondent in the old Congress as a Member of the House. After reviewing numerous issues, including: (a) the authority to challenge the qualifications of a Senator in impeachment proceedings; (b) analogies to the disqualification of jurors and judges; (c) Senate precedents[26]; and (d) substantive grounds for disqualification,[27] Goldstein concluded that:

> [A] Senator ought not to feel himself to be disqualified per se because of prior involvement in the House impeachment proceedings, including prior voting on impeachment. In a particular case, however, where a Senator has been uniquely and centrally involved in the House impeachment proceedings so that it "renders it improper, in his opinion, for him to sit on the trial,"...it would be proper for him to excuse himself. The fact that this is, therefore, an individualized determination rather than a per se rule strengthens my view...that it is a determination to be made by each

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[26] Goldstein summarizes the precedents, finding that in the Pickering trial in 1803, the Senate appeared to encourage former House Members to participate in the Senate trial. In the impeachments of Chase in 1805 and Peck in 1831, several former House Members participated in the Senate trials, but apparently there was no consideration of the disqualification issue by the Senate. In the Louderback impeachment in 1933, several former Members of the House were excused, at their request, from participating in the Senate impeachment proceedings. However, also in the Louderback case, the Vice President informed the Senate that he had presided in the House at the time that impeachment proceedings had occurred, but since he had not voted or expressed himself as to the merits, he apparently was of the view that he was not disqualified to act as the presiding officer for the Senate trial. See Goldstein II, supra, at 122-25.

[27] The basis for arguing that a former House Member should be disqualified is the fact that the House serves as the accuser and the Senate as the judge in impeachment proceedings and it could arguably defeat the separation of functions if a significant number of former House Members were to participate in the Senate proceedings. See Goldstein II, supra note 25, at 121, citing The Federalist, No. 66 (A. Hamilton). However, Goldstein apparently concluded that the participation of a few former Members of the House in the Senate trial would not violate the framers' intent to avoid a combination in impeachment proceedings of the functions of prosecutor and judge. Goldstein II at 122.

Senator involved, not by the Senate as a body.[28]

The other major problem, according to Goldstein, raised by the continuation in the Senate of impeachment proceedings from one Congress to the next is the participation of newly-elected Senators who assume their seats in the Senate after some testimony has already been taken in the trial.[29] In light of the general principle that "the one who decides must hear,"[30] Goldstein concluded that, at least in a presidential impeachment, "all efforts should be made to have all Senators hear and see all the witnesses...."[31] Apparently assuming that the evidentiary trial would not start until after the November election that precedes the new Congress, Goldstein recommended that Senators-elect (acting similarly to alternate jurors) sit with the Senate during the beginning of the trial at a lame duck session of the Senate.[32]

There are, however, other ways of dealing with this problem. (1) Newly-elected Senators who have missed parts of the testimony could be excused from voting.[33] (2) The newly-elected Senators could be provided with a transcript

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[28] Goldstein II at 136. The internal quotation is from 28 U.S.C. § 455, relating to the disqualification of judges, and is cited as analogous authority.

[29] Goldstein II. supra note 25, at 137-60.

[30] Morgan v. United States, 298 U.S. 468, 481 (1936). Morgan involved a challenge to the manner in which the Secretary of Agriculture performed his quasi-judicial, quasi-legislative statutory duty of fixing rates of market agencies for buying and selling livestock.

[31] Id. at 159.

[32] Id. at 143-44.

[33] Id. at 159. There is precedent for excusing Senators from voting in cases where they took the impeachment oath after testimony had already been taken or where, for other reasons, they were not sufficiently familiar with the testimony. Id. at 137, 140, citing precedents from the trials of Archbald (1912-13) and Louderback (1933).

of testimony taken in the previous Congress so that they could familiarize themselves with it.[34] (If the Senate, pursuant to impeachment rule XI, appoints a committee to receive evidence and take testimony and determines not to hear any witnesses in open Senate, then all Senators would have only a transcript available and newly-elected Senators would be in the same situation as other Senators). (3) The Senate could postpone taking testimony until the new Congress begins.[35]

Conclusion: The authority of the Senate to postpone taking evidence in the impeachment trial of Judge Hastings until the 101st Congress would seem to be supported both by precedent and the fact that the Senate is a continuing body. However, our research has revealed no instance in which the Senate began to take evidence in one Congress and concluded the trial in the next Congress. If the Senate were to begin taking evidence in the present Congress and to complete the trial in the next Congress, an issue might arise as to the participation of newly-elected Senators who did not hear the testimony taken in this Congress. However, there may be ways to deal with this problem and, in

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[34] Id. at 155, 157-59. However, according to Goldstein, "it would seem to be the better view that in a presidential impeachment at least, all efforts should be made to have all Senators hear and see all the witnesses and that reading a transcript should not generally be deemed a sufficient substitute for this." Id. at 159; see also id. at 155. The question of whether it is necessary for all Senators to hear and see all the witnesses will be considered below in the examination of impeachment rule XI, which provides for the appointment of a committee to take testimony and report a transcript to the Senate.

[35] See generally Goldstein II, supra note 25 at 161-62. Although postponement of the trial might possibly raise a question of the respondent's sixth amendment right to a "speedy trial", an impeachment is not generally considered to be a criminal proceeding (id. at 162; Berger, Impeachment 78-82 (1973)) and therefore the sixth amendment is not specifically applicable. Furthermore, even if a speedy trial is considered necessary simply out of fairness to the respondent, arguably a relatively brief postponement until a new Congress would not violate the respondent's rights. See Goldstein II at 162.

any event, if the Senate appoints a committee to receive evidence and determines not to hear any witnesses in open Senate, then the newly-elected Senators would be in the same situation as all other Senators.

(I) Findings and Recommendations of the Committee

The Senate Has the Authority To Continue Proceedings in Any Impeachment Case From One Congress to the Next

(1) Power to carry over in general

The clear weight of precedent and sound policy supports the conclusion, and the Committee hereby finds, that the Senate may continue a case at any point in the proceedings.

The cases of Lord Danby and Governor General Hastings show that the House of Lords understood that it had the authority to continue cases despite a dissolution of Parliament.

Jefferson's *Manual,* citing British precedent, states:

> When it was said above that all matters depending before Parliament were discontinued by the determination of the session, it was not meant for judiciary cases depending before the House of Lords, such as impeachments, appeals, and writs of error. These stand continued, of course, to the next session. . . .
>
> *Impeachments stand, in like manner, continued before the Senate of the United States.*[19]

The two United States impeachment cases most similar to the present proceeding, Pickering and most particularly Louderback, also show that the Senate may receive a case in one Congress and try the case in the next Congress.

Jefferson's *Manual,* quoted above, does not indicate *any* limit upon the authority of the Senate to continue a case, at any stage of the trial, if a continuance is necessary.

The conclusion that the Senate must have the power to continue a case at any stage is consistent with the generally accepted view that the Senate is a continuing body.[20] That concept is illustrated by the Standing Rules of the Senate which state that Senate Rules continue from Congress to Congress unless changed (Rule V, cl. 2); and that Senate committees are appointed at the beginning of each Congress and continue with the power to act until their successors are appointed (Rule XXV, cl. 1).

The respondent notes that "If the Senate did not have the authority to carry the articles forward to a subsequent Congress, it would be placed in an untenable position. The House would have power to restrict the power of the Senate to establish procedures it thought necessary for a fair trial and to control its own proceedings." The logical conclusion to be drawn from respondent's statement is that to control the proceedings and to provide a fair trial, the Senate may carry a case foward even after it has begun taking testimony.

The Senate cannot regulate the length of time necessary to complete proceedings in the House. Neither can it specify the date on which the House presents the articles of impeachment, nor dictate the complexity of a given case. If a case is presented a reasonable

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[19] Jefferson's *Manual,* § 592, contained in *Rules of the House of Representatives,* H. Doc. pp. 99–279, p. 287–288 (emphasis added and citations omitted).

[20] See for example Hinds, *Precedents,* Vol. 4, § 4544 and § 4545 at n. 1.

time before the end of the Congress but without sufficient time to complete the trial, the Senate might well determine that the interests of the nation and/or fairness to the parties, demand that the trial begin prior to the end of a Congress. For example, suppose a president were impeached a few months before the end of a Congress. The testimony in such a case might be voluminous and the trial lengthy. Nevertheless, the importance of the case to the nation and to the accused president, who would be forced to function under a cloud, might well mandate that the Senate begin the trial as quickly as possible even if it were obvious that the trial could not be completed prior to the end of the Congress.

The Senate has the constitutional duty to try impeachments. Depending on the nature of the case, it might be impossible to complete a trial in one Congress. To carry out its constitutional responsibility, the Senate must have the power to continue cases as it may become necessary. Any other conclusion would reduce that constitutional duty to a nullity.

Because the instant case was presented to the Senate at such a late date, it is convenient to the Senate and fair to the parties for the case to be continued before any testimony has been taken.

(2) Authority to continue this case

There is no doubt that this case may be continued into the next Congress. The finding of the Committee on this point is in accord with the unanimous conclusions of the House Managers, the respondent, the Congressional Research Service, and the Senate Legal Counsel. All agree that the Senate has the power to continue the case to the next Congress. Moreover, the discussion in section (1), above, demonstrates that the Senate's power is broader than that necessary to resolve the present case.

The Committee's recommendations, which follow, should not be construed to suggest legal restrictions on the Senate. Trial could begin in this Congress if the Senate wishes. The Committee's recommendations to the contrary are based on practical considerations and to ensure that there can be no question about the propriety of the Senate proceedings.

Moreover, the respondent and the Congressional Research Service point out potential problems should the trial begin in one Congress and be carried over to the next. These include the possible disqualification in the 101st Congress of newly-elected Senators who participated in the impeachment proceedings of the 100th Congress as Members of the House, and the participation of newly-elected Senators who take their seats in the Senate after some testimony has been taken in the trial. Respondent points out that the case may well be shaped by the early motions, and the ultimate disposition substantially affected by arguments made in the early phase of the case.

Committee Recommendations

1. It is obvious that the Senate could not conclude the case before the Senate adjourns *sine die*. In order to avoid procedural difficulties and to assure full and fair consideration of the case, the Committee recommends that the Senate adopt a resolution to (i) defer

all further action on the case, such as the appointment of an impeachment committee and the taking of testimony, until the next Congress; and (ii) direct this Committee to proceed with a hearing on the second and third procedural matters during the week of January 23, 1989, and issue its report of advice and recommendations thereon on or about February 1, 1989.

Continuing the proceeding to the next Congress will permit:

(a) this Commitee to hold a hearing and issue its report on the appropriate use of Impeachment Rule XI and any other matter which may assist the Senate in a fair trial of the pending impeachment;

(b) the Senate, if it determines to appoint an impeachment committee, to appoint one that includes new Members;

(c) the same Members who will hear the case to make the decisions regarding its procedure; and

(d) the entire proceeding to be prosecuted by the same team of House Managers.

2. The Committee recommends that the Senate direct the parties to be prepared to proceed with witnesses, whether before the full Senate or an impeachment committee, by March 1, 1989, or as soon thereafter as the Senate may order, and to work together to resolve pretrial matters, such as narrowing the issues and reducing the number of witnesses that will be called to testify through, among other methods, stipulations of facts and of authenticity of documents, and to that end, that the Senate advise the parties that it will make available the services of the Senate Legal Counsel to mediate disputes that might arise.

IV. The Appropriate Use, in the Pending Impeachment, of Senate Impeachment Rule XI

(A) Introduction

Rule XI of the Senate Impeachment Rules provides as follows:

> XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.
>
> Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and

purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

(B) Historical background and precedents

(1) British practice

The House of Lords has used committees to take evidence in impeachment cases. In the 1620 trial of Francis Bacon, the Lords ". . . appointed a select committee of themselves, to take Examination of Witnesses to the Briberies and Corruptions of the Lord Chancellor . . ." [21] A committee was used to take testimony in the trial of the Bishop of Landaff, who was accused with Bacon.[22] A committee also took testimony in the 1624 impeachment of the Lord Treasurer Middlesex.[23] The trials of Bacon and Middlesex are also discussed in Foster, *The House of Lords 1603–1649, Structure, Procedure, and the Nature of Its Business,* pp. 155–157 (University of North Carolina Press, 1983).

(2) United States practice

(a) *In General.*—Although there is no mention of committees in the discussion of impeachments found in the *Federalist Papers*, it cannot be doubted that the founders were aware of the British practice. Jefferson's *Manual*, at § 614, includes the following remarks concerning Parliament's procedure:

> WITNESSES. The practice is to swear the witnesses in open House, and then examine them there; or a committee may be named, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand.[24]

(b) *Senate precedents.*—Committees have been used by the Senate from the time of earliest impeachment trials. In the 1803 impeachment of Judge Pickering a committee was appointed to search precedents.[25] A similar procedure was used when the Senate named a committee to consider how to proceed in the 1830 case of Judge Peck.[26]

(c) *Impeachment committee rule first propounded.*—On March 25, 1904, Senator Hoare of Massachusetts proposed a resolution directing the Rules Committee to report on whether the impeachment rules, ". . . may properly and lawfully provide for taking testimony in such cases by a committee in accordance with the practice of the English House of Lords in such cases, questions of the admission of material testimony and the final argument being reserved for the full Senate." [27]

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[21] *State Trials*, Vol. 2, p. 1101.
[22] *Id.*, p. 1116.
[23] *Id.*, p. 1197.
[24] Rules of the House of Representatives, H. Doc. 99-279, at p. 299.
[25] *Senate Journal*, p. 332 (Jan. 3, 1804).
[26] See *Hinds' Precedents*, Vol. 3, § 2367.
[27] See *Hinds' Precedents*, Vol. 3, § 2217; 58th Cong. 2nd Session, *Record*, p. 3660.

Senator Sutherland made a similar proposal on December 16, 1912. His resolution was directed to the Judiciary Committee and would not have applied to an impeachment of the President, Vice President, cabinet members or a member of the Supreme Court. The resolution was prompted by the length of a case the Senate was then trying (Judge Archibald's case) and by the fact that many Senators could not be present to hear the testimony.[28]

(d) *Impeachment committee rule adopted.*—On May 24, 1934, Senator Ashhurst proposed a resolution to permit the appointment of a committee of 12 to take evidence in impeachment cases.[29] On May 28, 1935, S. Res. 18, which authorized the use of committees to receive evidence, was adopted.[30] The resolution became Rule XI of the Senate Impeachment Rules.

(C) Use of Rule XI in Judge Claiborne's trial

(1) *The impeachment committee role.* The present rule pertaining to the appointment of a committee in impeachment cases in the Senate was first used in 1986. On August 14, 1986, during the impeachment proceedings of Judge Harry E. Claiborne, the Senate adopted S. Res. 481 [31] which called for the appointment of a committee pursuant to Rule XI. The Vice President appointed twelve Members to the panel, six recommended by the Majority Leader and six recommended by the Minority Leader. The committee organized and elected as chairman Senator Charles McC. Mathias, Jr. Members of the staff of the Committee on Rules and Administration provided staff assistance to the impeachment committee, and the Senate Legal Counsel served as its counsel.

The committee was authorized, under S. Res. 481, to "perform the duties and to exercise the powers provided for" in Impeachment Rule XI. The committee's report (Report 99–511, reprinted in S. Doc. 99–48 at pp. 21–24), shows that it viewed its role under Rule XI as limited. It noted that Rule XI did not authorize the committee to make recommendations and it made none. Questions that were beyond its jurisdiction were referred to the full Senate.

The committee decided motions pertaining to the type and scope of evidence that would be heard. These included motions to accept, as substantive evidence, certain testimony and exhibits from Judge Claiborne's second trial and admissions by Judge Claiborne at his first and second trials, a motion to exclude evidence as irrelevant and a motion by Judge Claiborne for discovery.

Several motions were found to be beyond the jurisdiction of the committee and were moved for summary disposition of one article of impeachment or, in the alternative, that the Senate apply collateral estoppel to specific issues alleged in other articles. Similarly, Judge Claiborne submitted motions on which the committee lacked authority to rule, such as his motion to declare Senate Impeachment Rule XI unconstitutional and his motion requesting that the Senate designate that the standard of proof in an impeachment trial is proof beyond a reasonable doubt.

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[28] See 49 *Cong. Record*, pp. 698–699.
[29] 78 *Cong. Record*, p. 9431.
[30] 79 *Cong. Record*, pp. 8309–8310.
[31] See appendix for full text of S. Res. 481.

The committee also referred to the Senate a suggestion from several Senators that the Senate might benefit from the services of an expert on the subject of legal principles and procedures governing prosecutorial decisions customarily followed by the IRS and the Department of Justice.

In addition to ruling on motions within its jurisdiction, the Committee heard witnesses and received evidence including documents relating to proceedings in the courts concerning Judge Claiborne, a certified transcript of Judge Claiborne's second trial, and exhibits from the parties.

Several days of hearings were held by the committee from September 15 to September 23, 1986. Testimony was heard from three witnesses called by the House Managers and from sixteen witnesses called by Judge Claiborne. All witnesses were subject to cross-examination. The committee called no witnesses of its own but did recall one witness for further examination. The chairman and members of the committee also submitted questions.

(2) *Role of full Senate.* The Senate received the report of the Rule XI committee and the transcript of the proceedings and testimony given before the committee. It also received briefs and memoranda from the parties and numerous motions from Judge Claiborne. The Senate heard argument on motions and on the case but did not receive any evidence in addition to that heard by the Rule XI committee.

The trial of Judge Claiborne in the Senate began on October 7, 1986, and was concluded two days later, on October 9. At the trial, the Senate heard arguments on the Judge's motion for a postponement of the trial until after the courts had decided a post-conviction motion he had filed. The Senate also heard arguments on his motions to declare Rule XI unconstitutional and to designate, as the standard of proof in an impeachment trial, proof beyond a reasonable doubt.

By voice vote, the Senate adopted a motion by Senators Heflin and Warner to postpone decisions on all motions except the judge's first motion to postpone, until after the presentations of the parties. Judge Claiborne's postponement motion was denied by voice vote. By rollcall vote, the Senate defeated the motion to adopt the reasonable doubt standard.

The Senate voted in favor of Senator Dole's motion not to hear any additional witnesses in the case. Senator Dole explained that the motion was to determine whether to "reopen and have a trial or not have a trial." (p. 155) By its vote, the Senate recognized the validity of Rule XI and the rationale upon which it is based. Although the Senate elected not to hear any evidence, the full Senate did hear closing arguments by the House Managers, Judge Claiborne, and by his counsel. Pursuant to a unanimous consent agreement, on October 9, 1986, the Senate voted on each of the articles of impeachment and entered its judgment in the case.

(D) Statement of Chairman Charles McC. Mathias, Jr.

After the Senate concluded its trial, the chairman of the impeachment committee made a statement in the Senate concerning, among other matters, the use of the impeachment committee pur-

suant to Rule XI. The portion of his statement pertaining to the use of an impeachment committee follows:

> Members are now thoroughly familiar with the provisions of Senate impeachment rule XI. The rule authorizes the Presiding Officer to appoint, if the Senate so orders, a committee to take testimony in impeachment proceedings. Upon the committee's report to the Senate of a certified transcript of its proceedings, the testimonial and documentary evidence received by the committee is to be considered, to all intents and purposes, as having been received and taken before the Senate. The rule reserves to the Senate the right to determine the competency, relevancy, and materiality of this evidence. The rule also preserves the right of the Senate to send for any witness and hear that witness' testimony in open Senate, or by order of the Senate to have the entire trial in open Senate.
>
> What may be less familiar to the Senate is the fact, which is demonstrated by rule XI's English antecedents and the Senate's prior impeachment experiences, that it is not novel for Senators to base their judgments in an impeachment trial on a written record of previously recorded testimony.

THE ENGLISH ANTECEDENTS

In 1916, in support of a proposal that the Senate consider alternatives to the taking of evidence in open Senate Alexander Simpson, who had been one of Judge Robert Archbald's counsel at an impeachment trial several years earlier, cited as authority a passage in "Jefferson's Manual of Parliamentary Practice." See A. Simpson, "A Treatise on Federal Impeachments" 68. Jefferson had prepared the manual, for his guidance as President of the Senate during his Vice Presidency from 1797 to 1801. On the subject of witnesses at impeachment trials, Jefferson, reflecting on English impeachment practice, wrote that:

"The practice is to swear the witnesses in open House, and then examine them there; or a committee may be named, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand."

Constitution, Jefferson's Manual, and Rules of the House of Representatives," (H.R. Doc. No. 277, 98th Cong., 2d Sess., § 614, at 296 (1985)).

While the choice of impeachment procedures cannot be left exclusively to a study of English practice, the evidence appears to be that, at least for a period of time, committees were used in the House of Lords during the trials of impeachments. In 1620, for example, the House of Lords "appointed a select Committee of themselves, to take Examination of Witnesses" in the trial of Sir Francis Bacon. 2 T. Howell, "A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783"

(1101 (1816)). The same year the House of Lords appointed a committee to examine witnesses in the trial of Dr. Theophilus Field, Bishop of Landaff. (Id. at 1116.) IN 1621, the House of Lords examined witnesses in committee in the trial of Sir Giles Mompesson. (Id. at 1122–24.) Then, in 1624, depositions taken by a committee were read to the House as evidence of impeachment charges against Lord Treasurer Middlesex. (Id at 1183; 3 H.L. Jour. 350, 352–61, 365.)

I have in my office several volumes of these reports of State Trials which came from an old Maryland law library where I believe they had been since before the Revolution. The Constitutional language "high crimes and misdemeanors" suggests that the Founders were familiar with these reports and presumably with the established practice of employing committees to take impeachment evidence.

The use of committees during impeachment trials in the House of Lords is documented in an article by Prof. Napoleon Williams, which he wrote in response to a brief suggestion to the contrary by Professor Berger. I ask unanimous consent that an excerpt from Professor Williams' article, "The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials," (50 N.Y.U.L. Rev. 512, 528–32 (1975)), be reprinted as an addendum to my statement today.

These English precedents indicate that, in utilizing Impeachment Rule XI, the Senate is not writing on a blank slate.

THE HISTORY OF RULE XI

While the Claiborne impeachment was the first Senate impeachment trial in which witnesses were examined before a committee and not on the Senate floor, rule XI is not a departure of the practice of receiving evidence through a printed record.

The initial suggestion that a Senate committee receive impeachment evidence was made in 1904 after the House had initiated an investigation of District Judge Charles Swayne. Senator George Hoar proposed an addition to the Senate's impeachment rules to require the Presiding Officer (except in an impeachment of the President or Vice President) to appoint a committee:

"To take all the testimony on both sides . . . [and] cause all the testimony by them heard to be reduced to writing and reported to the full Senate." (38 Cong. Rec. 3902 (1904)).

The resolution was referred to the Committee on Rules which took no action on it, and the Swayne impeachment trial proceeded in 1905 without the use of a committee.

The suggestion for a committee was renewed in 1912 during the impeachment trial of Circuit Judge Robert Archbald. Senator (later Justice) George Sutherland intro-

duced a resolution to amend the impeachment rules to provide that in all subsequent impeachments, except when the President, the Vice President, a Cabinet member, or a Justice of the Supreme Court is being tried, testimony may be taken by the Judiciary Committee and reported to the Senate. Senator Sutherland compared this procedure to the "reference, in the case of a court of equity, to a master, and in the case of the Senate by reference to a special committee or to a standing committee." (49 Congressional Record 698 (1912).)

In the remarks to the Senate, Senator Sutherland paid special attention to the reality that at impeachment trials many Senators learn of all or portions of testimony through a written record rather than by direct observation of witnesses. He noted that because of other business of the Senate, "[m]any of the Senators could not be present to hear the testimony . . ." Consequently, for those Senators, "[o]f necessity they are obliged to read [the testimony] before the can act. The same result, it seems to me, would be obtained to referring the case in the first instance to the Judiciary Committee to take the testimony and report it to the Senate."

The Senate did not act on Senator Sutherland's suggestion, but his idea and the idea enunciated earlier by Senator Hoar persisted. Several years after the Archbald impeachment, Alexander Simpson, who, as I have indicated was one of Judge Archbald's counsel, suggested that impeachment evidence be taken by a committee or, preferably in Simpson's view, by U.S. judges, expect when the President, Vice President, or a Supreme Court Justice is impeached. Simpson shared Senator Sutherland's observation about attendance during the Archbald trial: "[T]he thing that strikes a common law lawyer most is the few Senators who in fact listen to the evidence. During the Archbald Impeachment the membership of the Senate exceeded ninety, yet rarely over twenty members were present." A. Simpson, A Treatise on Federal Impeachment 67 (1916).

Simpson regretted that few Senators actually heard testimony directly, but he also expressed his understanding that, after periodic quorum calls during the trial, Senators would "return [move] from whence they came, leaving the Senate as bare as it had been before. While that result was, and in all such cases must be regretted, yet it is not so much to be wondered at. Most of the work of Congress must now be done by committees, and the Senator who really attends to the work, and is present at the important legislative sessions of the Senate, has all his official time fully occupied." Id.

The impeachment trial in 1933 of District Judge Harold Louderback brought again to the fore the problem of attendance at impeachment trials. Three years after the trial, Representative Hatton Sumners, chairman of the House Committee on the Judiciary and one of the manag-

ers at the trial recalled the scanty attendance of Senators, noting: "At one time only three Senators were present, and for 10 days we presented evidence to what was practically an empty Chamber." Impeachment No. 13, Time, March 16, 1936, at 19.

In reaction to the Louderback trial and at the urging of many Senators, Senator Henry Ashurst, the chairman of the Committee on the Judiciary, offered in 1934 the resolution which became Impeachment Rule XI following its adoption the next year. Senator Norris, who had experienced impeachment trials as a House manager in 1912 at the Archbald impeachment and as a Senator in 1933 at the Louderback impeachment, related to the Senate, as Senator Sutherland had done 20 years earlier, that most Senators in the final analysis would have to study the evidence in a printed record. In Senator Norris' words,

"I think the object of the resolution is to avoid what always takes place in an impeachment trial before the Senate. There are times when there is not a quorum in the Senate present, when a dozen may not be here, when there are less than the number provided as the membership of the proposed committee to take the evidence. There is no use expecting all the Senate, or a quorum of the Senate, to be present every minute while evidence is being taken. Senators have to read the evidence in the RECORD in order to know what it is." 78 *Congressional Record* 9929 (1934).

The use of committees to receive evidence at impeachment trials is a matter, therefore, which has had the attention of thoughtful Senators in this century. In an ideal world we might all prefer that each Senator personally hear all impeachment evidence, just as we might prefer that each Senator personally hear witnesses to every matter bearing upon war or peace or other aspects of the Nation's welfare that we are called upon to consider. However, we are required of necessity to learn through the study of printed records about many of the important matters which compete for our attention.

THE USE OF RULE XI IN THIS IMPEACHMENT

Rule XI, of course, does not require the Senate to receive evidence through a committee nor does it foreclose the Senate, even after evidence has been received by a committee, from calling for some or all of the witnesses to testify in open Senate. The question in any particular impeachment is whether, based on the facts of that impeachment, the rule should be used or used exclusively.

The principal deficiency attributed to rule XI is the contention that the triers of fact, the membership at large of the Senate, are unable to assess the credibility of witnesses. There may, indeed, be cases in which it is essential to observe witnesses directly, and there may be, perhaps, cases in which review of even a videotape is not an adequate substitute for direct observation. While it is not my

purpose in these remarks to review in any detail the evidence upon which the Senate convicted Judge Claiborne, I would like to offer several comments about the importance of evaluating the credibility of witnesses in this proceeding.

The point has been urged that the question whether Judge Claiborne wrote to his tax preparer, Joseph Wright, on April 11, 1980, to inform Mr. Wright of his full income from legal fees for 1979 presents an issue of credibility which cannot be determined from the printed record of sworn testimony. The difficulty with this contention is that it assumes that Judge Claiborne had a complete, or at least a compelling, defense if the letter had actually been written.

Of course, if the letter was written after the date it bears, then Judge Claiborne's tax violations would pale beside potential charges of prejury and the fabrication of evidence. It seemed to me, therefore, that we should begin by assuming that the letter had been written. We could equally assume that, for one reason or another, Mr. Wright had not seen the letter. Ellen Arthur, Judge Claiborne's newly discovered witness, stated in her affidavit that, 2 or 3 days after the judge's secretary had delivered an envelope to Mr. Wright's office, Mrs. Wright had stated that the letter could not be found or had been misplaced.

The assumption that the letter was written on April 11, 1980, does not elevate Judge Claiborne to high ground. Rather, the letter confirms an image of Judge Claiborne produced by other evidence. The judge was a person who had a very good sense of his financial situation. He prepared slips to memorialize his legal fee income and he recorded the information from the slips in a financial diary. On or about March 1, 1980, without consulting his detailed records, Judge Claiborne wrote to his accountant that his legal fee income for 1979 amounted to about $46,000. He was off by about $5,000, but he was in the right neighborhood.

Then, if we continue to assume that he wrote the April 11, 1980, letter on the date it bears, Judge Claiborne made a precise calculation of his legal fee income for 1979 on that day. He performed this calculation by totaling, on April 11, 14 separate items of legal fee income, and writing by hand a letter to his accountant which stated the result of this calculation. Judge Claiborne asked the Senate to believe that 19 days later he simply placed this careful calculation out of mind when he spoke to his accountant about the preparation of his 1979 tax return.

Then, 34 days later, when Judge Claiborne filed his judicial financial disclosure report, he again did not use the figure for legal fee income which he had only recently calculated. The disclosure report diminishes the relevance of another credibility issue; namely, whether Judge Claiborne had signed his 1979 return in blank or whether he signed the return in Mr. Wright's office after the return had been

prepared. The disclosure report confirms, no matter who is to be believed about the signing of the tax return, that Judge Claiborne knowingly intended to disclose to the Government, both on his disclosure form and on his subsequent tax return, only part of his legal fee income for 1979. These objective circumstances are sufficient to support the conviction on the first article without resolving the credibility of testimony about ancillary matters.

Then, with respect to the second article, it should be recalled that the case presented by the House consisted primarily of documents, including Judge Claiborne's tax return for 1980, and the testimony of an expert. A letter to Judge Claiborne dated April 6, 1981, from his tax preparer for 1980, Jerry Watson, establishes that Judge Claiborne knew that his tax preparer was planning to report a capital loss on the law practice which the judge had abandoned several years earlier. The patently fictitious capital gains transaction on the previously abandoned law practice, which was used to eliminate $88,000 in ordinary income from legal fees, was sufficient to establish a willful failure to report income for 1980.

The demeanor of witnesses may be important in other impeachments, but in this impeachment the critical facts were fairly established based on solely the written record. Furthermore, as Members were aware, videotapes of the committee's hearing were available to any Member who wished to supplement his or her reading of the transcript of the committee's proceedings.

THE SENATE'S OBLIGATION TO "TRY" IMPEACHMENTS

The Constitution provides that the Senate shall have the power to "try" impeachments. If the word "try" imported into the Constitution the exact specifications of a judicial trial, then the Senate might have little latitude to define its rules of proceedings. However, the Framers did not intend to obligate the Senate to replicate all features of a judicial trail. Hamilton recognized that the Senate "can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security." The Federalist No. 65, at 428 (B. Wright ed. 1961) Justice Story expressed the similar opinion that "it is obvious that the strictness of the form of proceeding in cases of offences at common law is ill adapted to impeachment." J. Story, Commentaries on the Constitution, § 765, at 532 (3d ed. 1858).

Instead, the requirement that conviction on impeachment be by "trial," I believe, was intended to fulfill the Framers' intent that the Senate act in "judicial character as a court." The Federalist No. 65, at 426 (A. Hamilton). The Framers intended that the Senate perform this judicial function impartially, "to preserve, unawed and unin-

fluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers." Id. at 427 (emphasis omitted).

In my opinion, the Senate performed its judicial task with complete impartiality. There were many outside of the Senate who thought that this impeachment should have taken the Senate only several hours to resolve after the House exhibited its articles in early August. The Senate determined, instead, that Judge Claiborne should have available to him the subpena power of the Senate to bring here witnesses who could testify to the tax transactions in 1979 and 1980. These witnesses were examined and cross-examined by counsel and also questioned by members of the committee over 7 days of hearings. The full Senate received briefs from the parties and then heard closing arguments from the managers, from Judge Claiborne's counsel, and from Judge Claiborne. The Senate deferred its decision whether to hear witnesses in open Senate until it heard and considered these arguments. Senators then deliberated with great care prior to voting. In every sense the Members of the Senate fulfilled their special impeachment oath to "do impartial justice according to the Constitution and laws."

I would like to conclude with a brief note of appreciation. Each member of the Impeachment Trial Committee—the vice chairman, Mr. Sarbanes and Mr. Hatch, Mr. Warner, Mr. Rudman, Mr. Pressler, Mr. McConnell, Mr. Heflin, Mr. DeConcini, Mr. Pryor, Mr. Gore, and Mr. Bingaman—approached the task of the committee with a great sense of purpose and seriousness. The membership of the committee agreed to, and then adhered to, a requirement that a quorum, a majority of the 12-person committee, be present at all times. The committee was presented with important questions about the proper scope of the impeachment proceedings before it, and our ability to resolve those questions, wisely I hope, depended on the intelligence and effort which each Member contributed to our deliberations. (S. Doc. 99–48, pp. 343–349.)

(E) Statement of House Managers [32]

B.(1) The Appropriate Use of a Committee Pursuant to Senate Impeachment Rule XI.

The House Managers are ready to proceed with the impeachment trial of Judge Alcee L. Hastings either before the full Senate or a Rule XI committee. In response to the request for comment on the appropriate use of a Rule XI committee, however, the House Mangers suggest that the Senate should consider two separate issues. First, should the Senate invoke Rule XI in these proceedings? Second, if the Senate decides to invoke Rule XI, what is the proper role of the committee?

[32] See footnote 14.

There is ample precedent for using a committee in the pending impeachment proceeding. The practice, which was first considered by the Senate in the beginning of this century, follows English parliamentary practice. In 1904, Senator George F. Hoar of Massachusetts submitted a resolution, considered by unanimous consent and agreed to by the Senate, directing the Senate Committee on Rules to consider and report on "whether the rules [on impeachment] may properly and lawfully provide for taking testimony in such cases by a committee in accordance with the practice of the English House of Lords . . ." S. Record, 58th Cong., 2d Sess. at 3660.

In 1935, the Senate adopted Rule XI in an effort to balance its constitutional role of acting as a Court of Impeachment with the demands of legislative business. In 1936, the then Chairman of the Senate Judiciary Committee, Senator Ashurt of Arizona, explained that the recent impeachment trial of Judge Louderback—

> . . . was dreary, involved and protracted, and that it was not according to public policy to have 96 Senators sit and take testimony. Subsequently, not a dozen, not 20, but at least 40 Senators urged that the Senate Committee on the Judiciary give its attention to the question whether or not a committee appointed by a Presiding Officer could take the testimony in impeachment trials, whereupon a resolution was introduced . . . and was adopted . . . .

80 Cong. Rec. 3424–3425 (1933) (remarks of Senator Ashurst).[5] In 1986, the Senate invoked Rule XI, during the impeachment trial of former Judge Harry Claiborne.

The use of a committee by the Senate when sitting as a Court of Impeachment is consistent with the practice of the House of Lords. As explained by Thomas Jefferson when setting forth English impeachment procedures, "the practice is to swear the witnesses in open house, and then examine them there; or a committee may be named who shall examine them in committee, either on interrogatories agreed on in the House or such as the committee in their discretion shall demand." Constitution, *Jefferson's Manual and Rules of the House of Representatives,* H.R. Doc. No. 279, 99th Cong., 2d Sess., section 614 (1987).[6]

The House Managers are of the view that the appointment of a committee in an impeachment proceeding is a matter within the

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[5] See 3 L. Deschler, *Deschler's Precedents of the United States House of Representatives,* section 18.6 (1977).

[6] Parliamentary history establishes that the House of Lords consistently used committees to hear the evidence presented by the House of Commons on a charge of impeachment. For example, as early as 1621, the House of Lords appointed a committee to hear witnesses in the impeachment proceeding of Lord Chancellor Francis Bacon. 2 *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors* 1101 (1816). Similarly, in the politically significant proceeding on the impeachment of the Earl of Middlesex in 1624, the House of Lords relied upon a number of committees to take evidence. *Id.* at 1197.

Following the presentation of the evidence by the House of Commons to a committee, the House of Lords would draw up a charge and forward it to the respondent. In the case of Lord Bacon, upon receipt of the charge he confessed and the House of Lords proceeded with judgement and sentencing. E. Foster, *The House of Lords 1603–1649* 155 (1983). In the case of the Earl of Middlesex, the proceedings continued before the House of Lords. It appears that the testimony taken in committee was read and the Earl of Middlesex was then allowed to respond. *Id.* at 158–159. He was not allowed the opportunity to reexamine witnesses. *Id.* At the conclusion of the proceeding the House of Lords found him guilty and sentenced him. *Id. See generally* Williams, *The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials,* 50 N.Y.U. L. Rev. 512, 528–532 (1975).

Senate's sound discretion. The Senate's "sole power to try all Impeachments," established in Article I, section 3 of the Constitution, includes the power to determine the procedures by which it exercises that authority. The appointment of a committee, however, is not mandatory. Thus the issue arises whether the Senate should invoke Rule XI in the pending proceedings on the impeachment of Judge Hastings. The House Managers respectfully suggest that a number of factors deserve consideration when the Senate exercises its discretion.

The impeachment of Judge Hastings is of no greater or lesser importance than the impeachment of former Judge Claiborne. In both cases the House of Representatives determined that the respondent had engaged in misconduct which violated the public trust, warranting removal from public office. The Senate used Rule XI in the impeachment trial of former Judge Clairborne. This precedent is a useful starting point from which to plan the proceedings in the pending case. In the Claiborne impeachment proceedings, the Rule XI Committee received the evidence in a timely manner and developed a full record for the entire Senate.

The nature of this case—the large number of articles and the complicated facts on which they are based—suggests the use of a Rule XI committee. The House Managers will attempt to stipulate with the respondent to the authenticity of documents and to facts that are not in dispute. Even if such stipulations are entered into, however, a large number of witnesses will be necessary in order to present the evidence supporting the 17 Articles of Impeachment.

The verdict of acquittal in Judge Hastings' criminal trial does not require the full Senate to sit as a body to take evidence during the impeachment trial. Article I, Section 2, clause 7 of the Constitution provides that impeachment is separate and distinct from a criminal prosecution. This fundamental constitutional principle, coupled with the Senate's "sole Power to try all Impeachments," establishes that a Senate impeachment trial is a self-contained, independent process. Criminal proceedings and impeachment serve fundamentally different purposes: the former is designed to punish an offender and seek retribution, while the latter is the first step in a remedial process. The purpose of impeachment is not personal punishment, but rather to maintain constitutional government through removal of unfit officials from positions of public trust. Thus the Senate's decision whether to appoint a Rule XI committee in an impeachment proceeding is wholly independent of a prior criminal prosecution, notwithstanding a jury verdict of acquittal or conviction.

If the Senate decides to invoke Rule XI in this case, it must also determine the proper role of the committee. In the Claiborne proceedings, the Rule XI committee conducted the pretrial proceedings and presided over the taking of testimony. The House Managers have no objection to following this precedent.

The House Managers believe that the Senate should avoid bifurcating the presentation of evidence in this impeachment trial. While Rule XI does not preclude the Senate "from sending for any witness and hearing his testimony in open Senate," the presentation of some evidence only to the full Senate and other evidence only to a committee runs the significant risk that undue weight

will be placed on the evidence presented on the floor of the Senate. Such a result is unfair to both parties. The House Managers are unaware of a legitimate means of dividing the evidence. One witness is not necessarily more important than another. Nor is one article of impeachment more important than another.

There are steps the Senate might consider to ensure that all of its Members are fully apprised of the evidence submitted to a Rule XI committee. Senators who are not appointed to the committee can be encouraged to attend the committee proceedings whenever possible, and space could be reserved for them. A videotape of the Rule XI committee hearings, edited to eliminate any time delays, can be made available to all Senators or played on the floor of the Senate prior to the final vote on the Articles of Impeachment. A daily transcript of the committee proceedings can also be sent to each Senator for review.[7]

None of these procedures are constitutionally required. The House Managers mention these procedures as ideas for the Senate's consideration.

[7] When Rule XI was enacted it was contemplated that the Senate could have the evidence submitted to the committee "reduced to writing, and laid before the Senators the next morning in the Congressional Record. If the Senator were absent during one day of the trial, he could read the testimony as printed the next morning." 80 Cong. Rec. 3425 (1933) (remarks of Senator Ashurst).

(F) Statement of Judge Alcee L. Hastings [33]

September 6, 1988

To: THE COMMITTEE ON RULES AND ADMINISTRATION OF THE UNITED STATES SENATE

Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Use of a Rule XI Senate Trial Committee to Receive Evidence in this Case.

The Committee asked us to submit Judge Hastings's views on the appropriate use of Rule XI of the Rules of Procedure and Practice in the Senate When Sitting in Impeachment Trials in the pending impeachment. We do not believe Rule XI, as presently drafted, can properly be used in the trial of this impeachment. We develop those views in part I of this memorandum. In connection with that request, the Committee also asked us to provide such detail as was feasible concerning the number of witnesses to be called, the nature of their testimony, and the amount of time to be consumed in the presentation of the judge's case. In so far as we can determine, the Senate has ordinarily insisted that the House provide this information to the accused *before* the accused was required to frame a response. Nonetheless, we have responded to the request in part II of this memorandum.

I.

The Senate should not delegate the function of hearing testimony and receiving evidence to a Rule XI Senate trial committee in the trial of the present impeachment.[1] Three points compel this conclusion:

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1 Rule XI, as presently drafted, appears only to authorize the appointment of a Senate committee to receive testimony and other evidence in connection with the trial of an impeachment. For reasons developed in the text, we think it clear that use of a committee for that purpose in this case would be improper.

There is precedent in England and in the Senate for the use of committee's to address certain pretrial matters, and the procedures by which federal courts may delegate such duties to a magistrate are now codified at 28 U.S.C. § 636 (1982 & Supp. IV 1986). The use of a committee to assure proper discovery and to make preliminary determinations on pretrial matters, such as those typically embodied in a pretrial order in preparation for a jury trial in a federal court, might facilitate the trial of this impeachment. We do not, however, understand Rule XI to authorize this procedure. Accordingly, we have not addressed whether and to what ex-

[33] See footnote 15.

1. The fact that a jury has rejected most of the allegations that the House has made precludes the use of a Senate trial committee in this case. The twelve jurors who heard witnesses testify and observed their demeanor under examination and cross-examination were unanimous in their view: Judge Hastings was not guilty. If the allegations are to be retried, no Senator should be required or permitted to repudiate that finding unless he or she has also heard the witnesses and observed their demeanor and has, upon that basis, concluded that the jury was wrong.

2. The procedures employed by the House, and those that preceded its action, so far departed from the procedures employed in prior inquiries into a judge's conduct as to undermine the integrity of the process. Those departures enhance the need for the Senate to assure that Judge Hastings is accorded every right and protection customarily accorded by the Senate in the trial of an impeached judge in order to redress the balance and to assure confidence in the integrity of the outcome. For that reason also, the articles must be tried before the full Senate without resort to innovative special procedures of doubtful constitutionality that all must concede diminish in some degree the dignity of the proceeding and the rights of the accused.

3. The trial should be conducted before the full Senate in order that the Senate and the people may assess whether the constitutional plan should be altered. It has been more than fifty years since an impeachment was tried before the full Senate. Congress has attempted legislative revisions intended to avoid or limit the burdens imposed by the cumbersomeness of the process, and Rule XI represents a similar effort by the Senate. Both those efforts are of doubtful constitutionality, and there are those who believe that the Congress and the Nation should confront the issue directly and consider amending the Constitution to provide alternate mechanism for removing federal judges. Those on either side of the question should insist that any trial in this case be conducted in the traditional way so that there is a contemporary basis for any debate over whether the system works and whether or what revisions are necessary or proper. Those who have not tried it should not seek to change it. These points are developed below.

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tent the Senate might properly appoint a committee for such pre-trial purposes. We would be happy to address this matter should the Committee so request.

1. Deference to the Jury Commands A Trial in the Full Senate.

a. *Background*: In 1981, the government alleged that United States District Judge Alcee L. Hastings had been a participant in a corrupt scheme in which Washington attorney William Borders had solicited and accepted a bribe. It had no direct evidence that Judge Hastings was involved. Indeed, the FBI had decided in advance to arrest Borders at the scene of the payoff, rather than waiting to see if any part of the money would go to Judge Hastings. Judge Hastings denied any knowledge of or involvement in Borders's scheme. Given the government's conduct, he suggested that it appeared that he was a victim of an over-reaching or incompetent FBI sting operation *as well as* a corrupt lawyer's "rainmaking" scheme.[2]

The government's charges against Judge Hastings were tried before a jury in early 1983. The prosecutors acknowledged that the evidence against him was only circumstantial, but claimed that it established guilt. Judge Hastings testified that he was innocent and submitted evidence in support of that claim. He provided innocent explanations for the various circumstances which the prosecutors had offered as evidence of guilt. He was cross-examined fully. In closing, the prosecutors argued, point-by-point, that the judge's testimony was false and his evidence fabricated. The jury, the only body that has ever heard the testimony and considered the evidence and arguments *on both sides*, rendered its unanimous verdict on February 4, 1983: "Not guilty; so say we all."

Eleven of the articles of impeachment exhibited by the House simply restate allegations which the jury that heard the evidence on both sides at the 1983 trial unanimously rejected. The prosecutors presented their circumstantial evidence and claimed that it established that Judge Hastings was a participant in, rather than a victim of, Borders's corrupt scheme. The jury rejected that claim. The prosecutors claimed, point-by-point, that Judge Hastings's testimony was false and his evidence was fabricated and argued that only guilt could induce a judge to present false testimony and

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2 Judge Hastings's presented claims stemming from the conduct of the FBI and the Justice Department in the proceedings before the trial court. The designated judge ruled, however, that these questions should be deferred for consideration, until after the trial. The court did not address any of those claims.

fabricated evidence. The jury rejected those claims. The articles of impeachment reallege that Judge Hastings was a participant in Borders's corrupt scheme (article I). That is a claim that the jury rejected. The articles of impeachment allege, point-by-point, that Judge Hastings's testimony at trial was false and his evidence was fabricated (articles II-IX and XIV-XV). Those are claims that the jury rejected.

b. *Analysis*: The House has now called upon the Senate to readjudicate those allegations. In so doing they ask the Senate to impeach a jury's verdict, a verdict reached by another constitutional institution serving in a coordinate branch of government. If those allegations are to be retried and redetermined,[3] then respect for the jury as well as fairness to the accused should preclude the use of innovative short cuts by the Senate, such as those involved in the designation of a Senate trial committee to receive testimony and other evidence.

Those twelve jurors heard the testimony live. Those twelve jurors observed every witness as he or she was being examined and cross-examined. Those twelve jurors saw the other evidence as it was received. Those twelve jurors heard the contemporaneous arguments by counsel for both sides. The twelve jurors that sat through the trial and heard the witnesses testify and observed their demeanor under examination and cross-examination were unanimous in their verdict: Judge Hastings was not guilty.

If the charges are to be retried and redetermined, then the Senators must do what the jurors did. Those Senators who would repudiate the jury's verdict must also hear the witnesses live; they must also observe their demeanor under examination and cross-examination; they must consider the other evidence in the context of the testimony through which it is received; they must hear and consider the evidence against the background afforded by the opening statements made by the parties; and they must afford the parties the opportunity to address them in closing with confidence that they have heard and seen the evidence and can fully appreciate the arguments being advanced. Surely the Constitution and the requirements of basic fairness to the accused demand no less. Moreover, the nature of the

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3 The question whether a retrial is consistent with sound constitutional principle and policy is not before the Rules Committee and will have to be resolved by the full Senate after the initial pleadings have been filed.

allegations made by the House confirms the necessity for a trial before the full Senate.

Under each of the allegations made, the credibility of the witnesses would be central to a fair determination. For example, all have conceded that the evidence that supports the conspiracy alleged in article I is circumstantial.[4] For that reason, in a trial, the Senators would be required to assess the credibility of each of the witnesses who testified to the circumstances. The issue would be whether the testimony that established innocent explanations for those various circumstances, individually and as a whole, was credible and adequately undermined the darker view urged by those who claimed they established guilt. The decision would necessarily depend upon nuances that could only be assessed by those who had heard the testimony and observed witnesses. This the jurors did; this those who would impeach that verdict must do.

Assessing the credibility of the testimony would be equally central to a determination of the allegations set forth in the other articles. Articles II through XV simply parse and fragment the testimony that the judge gave at his trial and allege that in fifteen separate instances, he "did knowingly . . . make a false statement that was intended to mislead the trier of fact."[5] These allegations make the credibility of Judge Hastings the central issue to be determined and would, in most instances, require the trier of fact to as-

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4 The government's decision to arrest Mr. Borders at the scene of the payoff, rather than following the money so that the judge's innocence or guilt might be directly established, assured that the evidence would forever remain circumstantial.

5 Apart form the allegations set out in articles X-XIII, the prosecutor's submitted these allegations to the jury in the 1983 trial, arguing that only guilt in the underlying conspiracy could induce a judge to lie under oath. See Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary of the House of Representatives Pursuant to H. Res. 128 Impeaching Alcee L. Hastings, Judge of the United States District Court for the Southern District of Florida, of High Crimes and Misdemeanors, Ser. 11, 100th Cong. 2d Sess. [herein-after "Hearings"], Appendix III (Submissions by Judge Hastings [herein after "App. III""], 308 ("Perjury Charges Not New: 1983 Jury Rejected 'False Testimony' and 'Fabricated Evidence' Charges Against Judge Hastings") (citing transcript of prosecutor's closing argument at 1983 trial).

sess his credibility against the credibility of witnesses called by his accusers.[6]

The necessity that the trial of this impeachment be conducted before the full Senate does not require consideration of constitutional nuance; it is established by principles that are at the core of our system of adjudication. The central purposes of guaranteeing the accused the right to confront the witnesses against him and to cross examine them before the jurors who will decide the case has been long recognized and recently reaffirmed:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but also of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[7]

If the full Senate were only to receive transcripts of testimony taken by a Rule XI Senate trial committee, it would be using "depositions" and making credibility determinations without "compelling each witness to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon on the stand and the manner in which he gives testimony whether he is worthy of belief." Such a procedure in the present case would conflict with values that are at the core of our Constitution.[8]

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6 The allegations made in article XVI also make credibility the central issue. The triers of fact will have to decide whether to believe Mayor Steven Clark or Judge Hastings and, in so doing, will have to consider also the credibility of such other witnesses as may be called to corroborate the conflicting versions presented.

7 Kentucky v. Stincer, 107 S.Ct. 2658, 2662 (1987)(Blackmun, J.), quoting Matton v. United States, 156 U.S. 237, 242-43 (1895); see also Coy v. Iowa, 108 S.Ct. 2798, 2800-03 (1988) (Scalia, J.) (confirming necessity that witnesses confront accused before jury), and California v. Green, 399 U.S. 149 (1970) (White, J.) (confirming requirement that available witnesses be brought and compelled to submit to cross-examination before jury).

8 Those values are so central that they are embodied in the Due Process Clause and the common law rules of evidence as applied in civil jury trials. It is now

2. The Procedures that Preceded the Exhibition of the Articles of Impeachment Further Establish the Need for a Trail Before the Full Senate.

a. *Background*: Shortly after the 1983 trial, the judiciary launched its own investigation. For three and a half years, a committee of five judges, aided by paid lawyer-investigators and by FBI agents, sought additional evidence against the judge. At the outset of their hearings,[9] they that announced they would not be bound by the common-law or the Federal Rules of Evidence and that those rules would be used only when the committee thought them appropriate.[10] They called all of the witnesses *against* Judge Hastings, but called only eight of the more than forty witnesses who had testified *for* the judge at trial.[11] The five-judge committee admittedly found no material evidence against Judge Hastings that had not been available to the prosecutors at the time of trial. Nonetheless, they repackaged the evidence against the judge in a 381-page report and claimed that it showed that the jury was wrong -- that the judge was guilty and had presented false testimony and fabricated evidence at his trial.

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fairly established that the federal and state governments may not terminate statutory rights to hold office conferred upon low level government employees without affording them an adversarial hearing before a trier of fact at some stage of the proceeding. See e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) (White, J.) (security guard and bus mechanic); see also In re Peterson, 253 U.S. 300, 311 (1920) (Brandeis, J.) (holding that use of pretrial referral to auditor did not impermissibly infringe upon plaintiff's right to jury trial because the "parties will remain as free to call, examine, and cross-examine witnesses [at the trial before the jury] as if the [auditor's] report had not been made").

9 More than a year before the five-judge committee began its hearings, Judge Hastings had filed suit challenging the constitutionality of the Act and the manner in which it was being construed and applied against him. The case had been briefed and argued and was pending decision in the court of appeals. In order to avoid administrative exhaustive issues, Judge Hastings filed a special appearance objecting to the committee's proceedings. He did not otherwise participate in those hearings. See Hearings, App. III, 9-12 (for a summary).

10 Hearings, App. I at 491.

11 The committee did discover, incidentally, evidence supporting Judge Hastings allegations concerning misconduct of the FBI and the Justice Department. These issues were not pursued, however, and the evidence discovered was not disclosed or discussed in the committee's report.

In reality, the report prepared by the five-judge committee appears to have constituted the basis upon which the matter was certified to the House. The judicial council for the circuit ratified the allegations and certified them to the Judicial Conference after a single meeting and less than a month after the report had been submitted to it. The Judicial Conference voted to certify the allegations to the House less than two hours after it convened for one of its semiannual meetings on March 17, 1987. There is no indication that the members of either of these bodies received or reviewed the 4880-page transcript or the 2800 exhibits that the five-judge committee had compiled.

In the House, the inquiry was referred to an eight-member subcommittee, which obtained the services of special counsel, aided by four lawyers and supporting staff, to assist it. From the outset, Judge Hastings asked that the subcommittee permit his counsel to have a role comparable to that accorded judges in prior impeachment inquiries to assure that all proper avenues of investigation were explored and in order that his counsel as well as special counsel retained by the House Committee on the Judiciary could be properly prepared to present such testimony and evidence at the subcommittee's hearings as might be necessary to enable the subcommittee to make a proper record and recommendation. These requests were summarily rejected, and Judge Hastings's counsel were excluded from all phases of the prehearing inquiry.[12] After a year of silence, the product of this third investigation was unveiled: There was still no material evidence *against* the judge that was new. Nonetheless, after six days of hearings, the subcommittee recommended that Judge Hastings be impeached. Two aspects of the proceedings that produced the pending articles bear upon the issues at hand.

First, the House subcommittee that conducted the inquiry concluded that no rules of evidence should apply and that counsel for Judge Hastings should not be permitted to interpose any objections to evidence produced by special counsel or procedures employed during the subcommittee's hear-

12 The prehearing practices observed by the subcommittee are described and the exchange of correspondence with Judge Hastings is reproduced at Hearings, App. III, 1-57.

ings.[13] Under the procedures it established, the subcommittee did not hear the witnesses who testified at trial and refused to hear testimony from witnesses whom Judge Hastings asked it to call. The principal "witness" against Judge Hastings was the *lawyer* to whom the judiciary had paid more than $500,000 for conducting the post-trial investigation and preparing the 381-page report that recommended the judge's impeachment. He "testified" for two and a half days. The subcommittee called only two of the seventeen witnesses who had testified for the government at the 1983 trial; it did not call any of the more than forty witnesses who had testified for Judge Hastings. The subcommittee sat for five and a half days listening to testimony *against* Judge Hastings, but allowed only a half day for witnesses to testify *on his behalf*. Judge Hastings asked the subcommittee to call seventy witnesses so that they could be examined; of those, the subcommittee called only two, neither of whom had any information concerning the accusations made in the first fifteen articles. At the end of its hearings, it allowed the lawyer for Judge Hastings only *fifteen minutes* to state the case on his behalf.[14]

Second, the Committee on the Judiciary and the full House merely ratified the subcommittee's recommendations without independent review. The Committee on the Judi-

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13 Counsel for Judge Hastings made it clear that the procedures employed by the subcommittee represented a dramatic departure from precedent, practice, and rule in prior impeachment inquiries and deprived the accused of rights that had been accorded the officeholder in every formal inquiry conducted in this century (apart form the inquiry conducted with respect to a convicted Judge Harry Claiborne). Judge Hastings submissions on these points are reproduced at Hearings, App. III, 1-30, 244-50, 294-300, 458-63. Apart from some latitude on cross-examination granted on the fourth day of the hearings, all requests for relief were summarily rejected.

14 Notwithstanding the one-sided nature of the investigations in all three branches of government, after seven years, four points remained unchallenged. The case against Judge Hastings was and remains circumstantial. No one has ever suggested that Judge Hastings ever received any money from Borders, and all have conceded that there was nothing in the judge's background to suggest that he could have been induced to sell his office. No one has discovered any material evidence against Judge Hastings that was not available to the prosecutors at the time of the 1983 trial. Witnesses have died, documents have been destroyed, and memories have dimmed over the past seven years: What is left is the evidence that the government has chosen to collect and preserve.

ciary recommended the seventeen articles of impeachment *before* the record of the subcommittee's inquiry had been printed or distributed. The resolution adopting those articles was adopted by the full House less than a week later and one day after the summary report of the committee on the judiciary was printed.[15]

b. *Analysis*: Something is wrong. The Constitution sought to protect federal judges by guaranteeing secure tenure and compensation that could not be diminished. The three branches of government have now spent seven years and more than $2 million relentlessly investigating and reinvestigating the same allegations, without regard for the extraordinary psychological and economic burdens that their actions imposed upon the judge, his family, and his supporters. Seven years is too long; $2 million is too much; and one trial should have been enough.[16]

The Senate does, however, have the articles before it, and the Senate must dispose of them. We do not suggest that the Senate Rules Committee or the Senate can properly dispose of them at this stage on the basis of claimed defects in the House's procedures. We do submit, however that the procedures employed in the House and the judiciary enhance the need for a full trial on the Senate in two ways:

(1) The reliance upon "committees" and the procedures those committees employed in the prior proceedings precludes further delegation and establishes the need for a plenary proceeding at this stage; and

(2) This is the first impeachment that is the result of a certification by the judiciary under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act").[17] As such, the case would merit careful scrutiny by the full Senate in any event. More importantly, the procedures employed within the judiciary as well as those

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15 Impeachment of Judge Hastings: Report of the Committee on the Judiciary to Accompany H. Res. 499, H. Rep. 810, 100th Cong. 2d Sess. (August 1, 1988) (distributed August 2, 1988); [hereinafter "Impeachment Report"].

16 As conservative columnist James J. Kilpatrick concluded, after reviewing the report submitted by the judiciary: "This won't do. If impeachment would not be double jeopardy in law, it would be double jeopardy in fact. This strikes me as intolerable. Hastings is not my kind of judge, but fair's fair. Call the whole thing off." Kilpatrick, "Hastings Was Acquitted, Now Leave Him Alone" (Oct. 31, 1987).

17 Pub. L. No. 96-458, 94 State. 2035 (1980), codified as amended at 28 U.S.C. §§ 331, 332, 372(c), 604(h) (1982 Supp. IV 1986)

adopted by the House make it clear that a trial before the full Senate is now the only way that the Senate can properly execute its constitutionally assigned role in maintaining the proper separation between the judicial and the legislative branches and in protecting the independence of the individual judge in this case. We develop both views below.

(1)

The articles of impeachment are in reality a product of the work of two committees:

-- the five-judge committee that conducted twenty-seven days of hearings and thereafter prepared a 381-page report stating its view the evidence against Judge Hastings, and

-- the eight-member subcommittee that, in effect, audited the work of the five judge committee and then conducted eight days of hearings to lay a foundation for its concurrence in the recommendation that Judge Hastings be impeached. The use of committees and subcommittees for the conduct of impeachment inquiries is both necessary and established practice. Two aspects of their use in this case, however, mark the procedure here as extraordinary -- the extent to which the House subcommittee relied upon the work of a committee in the judicial branch, and its subsequent refusal to permit Judge Hastings to call witnesses in order to test the credibility of the evidence and report compiled by that committee.[18]

It is clear that the framers intended that the House and the Senate perform their functions independently when they proposed that the sole power of impeachment be assigned to the House and the sole power to try impeachments be vested in the Senate. At least with respect to the trial function, they explicitly rejected the idea that the power should be vested in the Supreme Court or a separate council.[19] One of the grounds for this rejection was that the members of the Supreme Court would be too few in number to serve the function adequately and that the membership of a council must either share that defect or constitute an institution

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18 The need for such witnesses and the specific witnesses necessary were forcefully presented to the House subcommittee. See Hearings, App. , 251-67, 271-89, 294-300. The subcommittee declined to call these witnesses.

19. See, e.g., The Federalist No. 65 (Hamilton), 439-445 (Cooke ed. 1961).

whose limited function would not justify its existence.[20] The clear intent was that an accused official would be tried by the full Senate, precisely because such a trial was necessary to afford the accused the intended protections. It is also clear that the framers concluded that the need for judicial independence enhanced the need for these institutional protections in cases against federal judges.[21]

Whatever the general effect of these provisions, they establish the need for a trial before the full Senate in this case. A committee of judges conducted a one-sided investigation and prepared a report that marshalled evidence to support their recommendation that Judge Hastings should be impeached. The resulting report and the credibility of its authors were such that its conclusions appear to have been routinely ratified and adopted after only cursory review within the judiciary. The House subcommittee, in so far as the record reflects, merely audited the record and report compiled by the committee of judges and embellished its work by fragmenting one of the recommended grounds for impeachment into fifteen separate articles. The House promptly adopted the recommended articles, without further review, and transmitted them to the Senate.[22]

As matters now stand, thirteen officials, five judges and eight members of the House, may fairly claim to have studied the evidence *against* Judge Hastings and to have concluded that it warranted impeachment. Twelve officials, the twelve citizens called to serve on the constitutional institution of the American jury, may fairly claim to have heard and studied the evidence *on both sides*. Those twelve were unanimous in their view that the evidence on both sides required that they reject the allegations made in eleven of the article now before the Senate.

By any fair and realistic view of the proceedings, Judge Hastings has been summoned to the bar of the Senate because the thirteen officials disagreed with the twelve. The

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20. See, e.g., Id. at 441-42 ("The necessity of a numerous court for the trial of impeachments" articulated).

21. See, e.g., The Federalist No. 79 (Hamilton), 531-34, 532-33 (impeachment and trial provisions the only "precautions for their responsibility . . . consistent with the necessary independence of a judicial character").

22 This analysis does not apply to the allegations set forth in article XI of the articles of impeachment. That article alleges new matters, but they are matters that may be simply tried and decided.

issues presented by the allegations set forth in the articles should not again be delegated to a committee by the Senate. This time they should be fully and fairly tried by the 100-member court specified by the Constitution, and no further short cuts should be permitted in the name of expediency.

(2)

This is the first case to come before the Senate as a result of the procedures established by the Act. For that reason alone, it is a case that merits careful scrutiny by all members of the Senate -- those who are concerned with establishing alternatives to the cumbersome process of impeachment and trial as well as those whose principal concern is with maintaining the independence of the federal judges from further erosion by experiments such as those embodied in the Act. The concerns on both sides are magnified by the procedures that were followed in this case.

The Act represented an experiment that respected members of the Senate thought unconstitutional.[23] The argument was forcefully made, in response, that the constitutional allocation of powers would be honored and the necessary independence of judges protected because the House and Senate had retained their respective sole powers and would exercise them independently, without undue deference to the views of the judicial branch. Two respected jurists who studied the question in the context of the proceedings within the judiciary in this matter have expressed substantial scepticism.[24]

The proceedings to date largely bear out the view of the sceptics. The House and its subcommittee made clear the extent to which they thought deference was due the report and recommendations submitted by the judiciary. There is now substantial ground to fear that, through the Act, the Congress has tacitly amended the Constitution and adopted a modified form of joint-address. Under this view, the tacit amendment might be stated:

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23 See, e.g., Ervin, Separation of Powers: Judicial Independence 35 Law & Contemp. Probs. 108 (1970) (former Senator); cf. Hollomon, The Judicial Reform Act: History Analysis, and Comment, id. at 128. (former chief counsel to Senate Judiciary Committee).

24. See Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1104-11 (D.C. Cir. 1985) (Edwards, J., concurring); Hastings v. Judicial Conference of the United States, 829 F.2d 91, 109-11 (Buckley, J. concurring in part and dissenting in part).

> The judiciary may petition Congress for the removal of an article III judge. If a House subcommittee concludes the recommendation is adequately supported and if a majority of the House ratifies that determination, then the House shall submit the matter to the Senate. If this Senate concurs, by a vote of two-thirds of the members present, then the judge shall be removed.

In this view, the issue upon which this Committee must now advise the Senate is whether the Senate should dilute the constitutional system further by delegating its function to hear testimony and receive other evidence to a committee and by limiting its role to hearing arguments and deciding whether to grant or withhold its concurrence on the basis of a paper record compiled by a committee.

Judge Hastings is the first federal judge who has been acquitted upon the unanimous verdict of jury following an investigation by the grand jury and prosecution by the executive. Judge Hastings is, for that reason, the first acquitted official to be impeached on allegations that he committed the crimes of which a jury had acquitted him. Judge Hastings is the first judge that the judiciary has certified to the House after conducting an extensive independent investigation under the Act. Apart from the case involving the convicted judge, Judge Hastings is the first official in more than one hundred years who has been denied the right to object to evidence and call witnesses on his own behalf in an impeachment inquiry conducted in the House.

Judge Hastings is aware that, at all stages, his accusers have found the means chosen to be necessary and proper expedients designed to achieve a desired end. He submits here, however, that he has served as a constitutional guinea pig for long enough. He submits that, if he is to be tried, the Senate should do it the old-fashioned way, the way established by its precedents extending over the first 150 years of the nation's history, the way honored in every impeachment trial in our nation's history, other than the trial of the convicted official. He submits that all aspects of the trial, from opening statement through closing argument, should be conducted before the full Senate so that all Senators may properly execute their constitutional duty to serve as both jurors and judges.

3. The Senate should Conduct the Trial Before the Full Senate to Create a Record Upon Which the Congress and the People May Consider Whether Further Revisions in the Procedure Established for the Removal of Judges are Warranted.

For the first 150 years officials in all three branches acted as if they had a shared understanding of the meaning and effect of the constitutional previsions adopted to guarantee the independence of federal judges through the tenure and compensation guarantees that were terminable only through the designedly cumbersome processes of impeachment by the House and trial by the Senate. Until 1936, the executive never attempted to prosecute a sitting federal judge; complaints were routinely referred to the House. Throughout that period and, indeed, until 1970, the judiciary recognized that the processes of appellate review, the use of writs of mandamus and prohibition, and the powers of supervision exercised by appellate courts were the formal means by which the conduct of the judges of inferior was to be regulated and, where appropriate, criticized. Throughout that period, the judiciary also recognized that peer pressure constituted a powerful, albeit informal, source of power to regulate and sanction the aberrant judge. Until the 1970's, the judiciary did not conceive itself as having the power to conduct administrative investigation and hearings or to impose administrative sanctions. Assuredly, it never sought or exercised any formal role in the processes by which judges were appointed or removed.

During that period, the House and the Senate accepted and discharged the duties imposed upon them by the Constitution. The House conducted more than forty inquires into the conduct of federal judges, almost all of them inquiries directed at the conduct of trial court judges.[25] During that period, the House impeached ten judges and exhibited its articles to the Senate. During that period, the Senate, the full Senate, tried judges. It acquitted five, and convicted four.[26]

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25. See e.g., House Committee on the Judiciary, Impeachment: Selected Materials on Procedure, 93d Cong., 2d Sess. (Comm. Print 1974) [hereinafter "Impeachment Procedures"] (accurate but incomplete listings).

26. See Impeachment Report, supra n.15, 6-7 (for a summary); Impeachment Procedures, v. (for list of trials through 1933). The last full trial in the Senate was

There have been complaints about the system throughout. There have been complaints about judges who abused their freedom without so comporting themselves as to merit impeachment. There have been complaints by Senators about the burdens imposed upon the Senate's legislative time by the need to try an impeachment of district court judges.[27] Those complaints notwithstanding, throughout that period, the Senate accepted the responsibility assigned it by the Constitution and executed it in accordance with established precedent.

The changes during the past fifty years, and especially during the past decade, have been dramatic in the aggregate. The executive has discovered and vigorously exercised a power to investigate the conduct of the judges who the framers sought to protect from fear by the executive coercion so that they might better serve as impartial, independent, and fearless adjudicators in disputes where the powers of the executive were challenged by the individual citizen. As the present case indicates, the powers the executive now claims are expansive and subject to few limitations -- the use of criminal informants, undercover sting operations, electronic surveillance, and the powers of the grand jury may all be brought to bear upon the individual judge. Today, the accused citizen must submit disputes with the executive that concern his or her liberty and property to a judge who sits knowing, "There, but for the grace of the prosecutor, go I."

Over the same period, the corporate judiciary emerged with its Judicial Conference and circuit councils and conferences to improve the administration of the courts. That the resulting administrative burdens imposed upon the district judges of the trial courts were necessary does not alter the fact that they added to the burdens and constraints that had always existed. The contemporary drive for accountability and efficiency have also had their impact. The financial disclosure provisions of the Ethics in Government

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the trial of Judge Ritter in 1936. The list does not include Judge Ritter's trial or that of Judge English who retired during trial.)

27. See, e.g., Proceedings of the United States Senate in the Trial of Impeachment of Harold Louderback, 72nd Cong., 2d Sess. & 73rd Cong., 1st Sess., 10-12 (complaints by Senator Long about the Senate "fiddling its time away over a little impeachment fiasco" concerning "some judge in California").

Act[28] and the requirements imposed by the Speedy Trial Act[29] are but two illustrations. That the burdens imposed by such statutes were also necessary and proper does not alter their character as added burdens. District judges today must now serve as junior executives in the corporate bureaucracy as well as executing their constitutional duty to preside over cases and controversies arising under the Constitution and laws of the United States.

Viewed against this background, the Act was but one more addition to the arsenal of burdens and constraints imposed upon the judges of the inferior courts, primarily upon those who set on the federal trial courts. The question whether these burdens were necessary and proper is fairly debateable.[30] In the present case, however, Judge Hastings has endured them, and the only issue is whether the Senate will accord him now the protections that can only be accorded by a plenary trial before the full Senate. Against that background, he submits that the Senate should and, in fairness, must afford him that modest redress.

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28. Codified as applicable to judges at 28 U.S.C. App. 427 (1982).

29. Codified at 18 U.S.C. § § 3161 et seq. (1982).

30. Hastings v. Judicial Conference, supra, 770 F.2d at 1104-11 (Edwards, J.) 829 F.2d at 109-11 (Buckley, J.); see also Note, Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 Yale L.J. 1117 (1985).

Conclusion

The Committee should recommend that the pending articles be tried before the full Senate. The accused enters this forum cloaked not only by the traditional presumption of innocence, but also by the unanimous verdict of the jury, the only body to hear the testimony on both sides. The Senate should not accord any official in this position less process than it has accorded as their due to those who have gone before.

The need for a plenary hearing is further enhanced by the political nature of the process that led to the House's action. The House did nothing when the Justice Department publicized the charges and filed the indictment in 1981 The House did nothing after the jury returned its verdict in 1983, notwithstanding the availability of the complete records from the separate trials of Judge Hastings and William Borders. The House did nothing for the four succeeding years. The House only acted when the Judiciary certified its determination to the Speaker. Then the political context changed. When the House acted, it denied the certified judge procedural protections routinely accorded judges in the past and, indeed, denied him procedural rights it has granted to the convicted judge who is now the subject of an inquiry.

Absent action by the judiciary, the House and the American people would have accepted the jury's 1983 verdict, and there would have been no further proceedings. Judge Hastings is now before the Senate because the judicial and executive establishments effectively created the political context that compelled action by the House. It is now for the Senate to determine why Judge Hastings is before it and what should be done to dispose of the accusations that have been made. If the Senate is to perform the role assigned it, all proceedings in the trial of this impeachment should take place before the full Senate and in the view of the American people.

(G) House Managers' Response to Judge Hastings' Statement [34]

I. Response to Judge Hastings' Arguments in Favor of a Full Senate Trial

Judge Hastings argues that the procedures used by the Judiciary, in the course of its investigation pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, and by the House of Representatives, in its impeachment proceedings, were unfair, thereby establishing the need to forgo the use of a Rule XI Committee for receiving testimony.[1] Although the House Managers take no position on the question of whether the Senate should exercise its discretion to appoint a committee pursuant to Rule XI, respondent's argument against the use of a committee is without support. As discussed below, it is entirely untrue that the procedures used were either unfair or less protective of respondent's interests than procedures previously employed. Moreover, as a threshold matter, the process preceding the exhibiting of Articles of Impeachment to the Senate is totally irrelevant to that Body's determination as to how it will conduct an impeachment trial.

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[1] Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Use of a Rule XI Senate Trial Committee to Receive Evidence in this Case [hereinafter "Respondent's Memorandum on Rule XI Committee"] at 7-14.

[34] See footnotes 14 and 16.

Finally, the fact that some of the Articles of Impeachment relate to charges that were adjudicated in a criminal trial is irrelevant to the Senate's decision to appoint a Rule XI Committee.

A. The Procedures of the Judiciary and the House of Representatives are Irrelevant to the Senate's Decision to Invoke Rule XI

The fairness, thoroughness, and adherence to precedent in the proceedings of the Judiciary and the House of Representatives are irrelevant to and should have no impact on the Senate trial. When the Senate votes on the 17 Articles of Impeachment, its decision will be based upon the record developed in the Senate, whether received initially by a committee or the full Senate. The Senate conducts proceedings that are fully independent of prior proceedings. The record created in the Investigating Committee of the Eleventh Circuit and the House of Representatives will not form the basis upon which the Senate will deliberate. Rather, the earlier records were compiled in order to permit the Judicial Conference and the House of Representatives to determine, respectively, whether cause existed to refer the matter to the House or to impeach respondent.

Judge Hastings has not indicated why or how reliance on the full Senate to receive testimony will alleviate any alleged harm resulting from the purported improprieties in earlier proceedings. Either the use of a Rule XI Committee is effective and consistent with the Constitution and the Senate's notion of fairness or it is not. The use or non-use of a committee to receive testimony will not, in any event, remedy the alleged transgressions of other institutions.

B. The House Procedures were Fair and Accommodated Judge Hastings' Legitimate Interests

Judge Hastings' attack on House procedures is not only irrelevant, but rests upon a statement of facts that is patently untrue. With respect to his recitation of the procedural history of this case, respondent has grossly misrepresented the record. His distortions with respect to the procedures used in previous impeachments are equally disingenuous.

Respondent asserts that his request to be involved in all phases of the pre-hearing inquiry were "summarily rejected," and that this is at variance with "the role . . . accorded judges in prior impeachment inquiries."[2] In fact,

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[2] Ibid. at 8.

so far as the historical record indicates, participation in the investigatory stage by the respondent has never been allowed,[3] and Judge Hastings cites no authority to the contrary. Nor does he even attempt to articulate a rationale for creating an unprecedented intrusion into the work of a Congressional committee.

With respect to the conduct of the public hearings, Judge Hastings' representations are equally misleading. He alleges that the Subcommittee on Criminal Justice refused to call 68 of the 70 witnesses that he had requested.[4] However, respondent fails to tell this Committee two critical facts: First, the vast majority of those witnesses were proffered only to testify as to alleged improper motive or bias in the criminal and judicial investigations; they had no information to offer with respect to the substantive allegations against the judge.[5] Second, in his final witness list,[6] respondent narrowed his request, so that aside from witnesses who fit within the above category, he asked that only three witnesses be called to testify before the Subcommittee. Two were called and did testify. The third witness was unavailable during the time set for hearings. With respect to several other witnesses, the respondent sought to submit written statements in lieu of testimony, which the Subcommittee permitted.[7]

Thus, Judge Hastings' complaint is in essence that the Subcommittee did not call scores of witnesses whose testimony was irrelevant. The issue before the House was whether the evidence was sufficient to warrant Articles of Impeachment. It should also be noted that, notwithstanding the Subcommittee's repeated requests, at no time did respondent make any proffer as to the specific evidence he expected to elicit which would support his allegation of improper motive or bias. Therefore, there was every reason to believe that

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3 See discussion on pre-trial discovery, infra.

4 Respondent's Memorandum on Rule XI Committee at 9.

5 Judge Hastings' original witness list appears in Appendix III to Hearings: In the Matter of the Impeachment Inquiry Concerning United States District Judge Alcee L. Hastings before the Subcomm. on Criminal Justice of the Com. on the Judiciary of the House of Representatives, 100th Cong., 2d Sess. (1981) at 263-267 [hereinafter "Appendix III"].

6 Appendix III at 271-289.

7 Appendix III at 367-71.

respondent was on a fishing expedition with no basis for believing that he would be able to adduce any evidence in support of his thesis. The inclusion of such unlikely witnesses as Chief Justice William Rehnquist and former Chief Justice Warren Burger would appear to support this conclusion.

In any event, it is clear that the Subcommittee was entirely justified in calling only those witnesses requested by Judge Hastings who had something to say regarding the facts of the case.

Respondent also complains that the Subcommittee did not call "the more than forty witnesses who had testified [at trial] for Judge Hastings."[8] He fails to mention that originally he asked the Subcommittee to call only two of these witnesses, and that even these two did not appear on his final list.[9]

To bolster his argument that he was treated unfairly by the House, respondent asserts that "the procedure employed by the subcommittee represented a dramatic departure from precedent, practice, and rule in prior impeachment inquiries and deprived the accused of rights that had been accorded the officeholder in every formal inquiry conducted in this century (apart from the inquiry conducted with respect to a convicted Judge Harry Claiborne)." (Emphasis added.)[10]

Judge Hastings' argument is without merit. First, the implication that the respondent is entitled to certain procedures or rights in an impeachment inquiry, by virtue of precedent, practice, or rule, is untrue. The history of impeachment demonstrates that each proceeding has been unique, and that no Congress has felt bound to follow the procedures followed in previous cases. The fact that "the process has been used so infrequently and under such widely varying circumstances [has meant] that no uniform practice

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8 Respondent's Memorandum on Rule XI Committee at 9.

9 Appendix III at 271-289. The two witnesses were a trial judge who allegedly knew of other, unrelated "rainmaking" schemes (and whose testimony was excluded as irrelevant by the court), and an FBI agent.

10 Respondent's Memorandum on Rule XI Committee at 9, n.13.

has emerged."[11] Moreover, to the extent that a respondent was granted any role in the House proceedings, it was a matter of privilege rather than entitlement.

Second, historically, the procedures employed in prior impeachments have reflected the prevailing notions of fairness at the time of the proceedings. Thus, most of the cases cited in Jefferson's Manual, and relied upon by Judge Hastings,[12] in fact involved ex parte proceedings.[13] That is, in the House, neither the respondent nor his counsel was allowed to participate in the Committee proceedings. Eventually, the right to counsel and, later, the right to appear and question witnesses was permitted, although not consistently.[14]

With respect to twentieth century impeachments, the House afforded Judge Hastings procedures consistent with past practice. He was permitted to attend all hearings, to question witnesses,[15] to call all relevant witnesses, and to make an opening and closing statement. He was invited to testify in his own behalf, which he declined to do. In addition, the House granted Judge Hastings' initial and most pressing demands -- that the hearings and the Report of the Investigating Committee of the Judicial Council be made public. Moreover, he was given voluminous evidentiary materials pertaining to the subject of the inquiry.

C. A Prior Jury Verdict is Irrelevant to the Use of a Rule XI Committee

Judge Hastings also argues that the fact that a jury "rejected most of the allegations that the House has made" precludes the appointment of a Rule XI Committee in this

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11 Staff of House of Representatives Comm. on the Judiciary, 93rd Cong., 1st Sess., Selected Materials 707 (Comm. Print 1973).

12 Constitution, Jefferson's Manual, and Rules of the House of Representatives, H.R. Doc. No. 279, 99th Cong., 2d Sess., § 606 (1987), cited by reference in Respondent's Memorandum on Rule XI Committee at 9, n.13.

13 Ibid.

14 Ibid.

15 Although time limits on questioning witnesses initially were stated, respondent's requests for additional time were granted without exception. Report to H. Res. 499, 100th Cong., 2d Sess., 11 (1988).

case.[16] Accordingly, he concludes that respect for the jury as well as fairness to the accused requires that this matter be heard by the full Senate. It is the position of the House that a jury verdict is irrelevant to the Senate's adoption of procedures.

Judge Hastings argues that in presenting Articles of Impeachment against him, the House is asking the Senate to readjudicate allegations decided by a jury and to impeach that jury's verdict. Respondent misstates the role and purpose of the Senate trial in an impeachment proceeding. The evaluation of the evidence by the Senate and its determination of the facts in this matter is not a "readjudication" of the allegations made in respondent's criminal trial. Rather the Senate's consideration of these matters serves an entirely different purpose: the determination whether by his conduct Judge Hastings is guilty of an impeachable offense which therefore warrants his removal from office. This determination, which is the sole responsibility of the Senate, must be made regardless of conclusions reached by a jury as to the criminal guilt or innocence of the respondent.[17] Because of the distinct functions served by the Senate in an impeachment proceeding and a jury in a criminal case, the Senate's determination in an impeachment proceeding neither impeaches nor validates a jury verdict.[18] An impeachment trial is not a criminal proceeding. Neither respondent's life nor liberty are at stake. Accordingly, to the extent that respondent suggests he is "cloaked . . . by the traditional presumption of

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[16] Respondent's Memorandum on Rule XI Committee at 2.

[17] The Senate's determination, in fact, is not linked in any way to a criminal prosecution. Neither a criminal trial nor a criminal violation is a prerequisite of impeachment.

[18] Indeed, because of the different standards of proof in the two proceedings — a jury verdict stands simply for the proposition that the Government has not proven beyond a reasonable doubt that the defendant committed a criminal offense — the two bodies could reach opposite conclusions without invalidating the determinations of each other. As stated by the Supreme Court,

> . . . [an] acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.

United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1983).

innocence . . . ",[19] he is incorrect.

In a different context, the Senate addressed the issue of the effect to be given to a jury verdict in the proceedings on the impeachment trial of former Judge Claiborne. There, the question was posed in the motions of the House Managers for summary disposition of the third Article of Impeachment (alleging that the fact of Judge Claiborne's conviction of two felony offenses was a sufficient basis for impeachment) and the application of the principle of collateral estoppel to certain issues alleged in the first two Articles of Impeachment. Although the Senate never specifically addressed the motions, the Rule XI Committee heard evidence independent of the jury verdict to support each of the allegations in the Articles of Impeachment and the Senate failed to convict on the third Article which alleged that conviction alone was a sufficient grounds for impeachment. In his separate statement Senator Mathias commented that "[i]n this manner, the Senate convincingly recorded its conclusion that it should not delegate the impeachment function to the courts by making removal a further and automatic consequence of a criminal conviction."[20]

For the same reasons, Judge Hastings' argument that fairness to the accused requires the Senate to process the evidence in the same way as the jury also misses the mark. The role of the Senate is to make an independent assessment of whether respondent's conduct warrants impeachment. The jury verdict does not obviate the need for this independent assessment. The fact that the verdict in this case happens to be one of acquittal in no way changes the responsibility of the Senate. Nor should it affect the decision as to which procedures are best suited to carry out the Senate's independent assessment.[21]

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19 Respondent's Memorandum on Rule XI at 20.

20 Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, a Judge of the United States District Court for the District of Nevada, S.Doc. No. 48, 99th Cong., 2d Sess. 343 (1986).

21 The irrelevance of the jury verdict is highlighted in this case because the facts supporting five of the Articles of Impeachment (four allegations of perjury and the charge that Judge Hastings improperly disclosed confidential information learned as a result of his supervision of a Title III wiretap) were never presented to a jury. Arguably only five of the remaining twelve Articles (Articles I - V) were decided by the jury which heard the bribery conspiracy allegations.

Judge Hastings also argues that "fundamental fairness" requires a full trial in the Senate because in this case the credibility of the witnesses will be central to the determination of whether to convict on the Articles of Impeachment. The House Managers agree that the credibility of the witnesses will be a factor in the determination of whether respondent should be found guilty of impeachable offenses. That fact does not require the full Senate to hear the evidence in this case. In the impeachment of Judge Claiborne the Senate proceeded by the appointment of a committee to hear the evidence in spite of Judge Claiborne's argument that the case presented an issue of credibility which could not be determined from the printed record. As we have previously stated, ample historical support for the use of a trial committee exists in the impeachment practice of the British Parliament.[22] Further support can be found in the Supreme Court's practice of exercising its authority to try cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party,"[23] by appointing masters to compile an evidentiary record for the Court's disposition.[24]

Thus, the Senate is in no way precluded from determining that the appointment of a Rule XI Committee is appropriate in this matter. In making this determination the Senate might consider the role of demeanor in judging credibility and the availability of videotapes as a substitute for personal observation. However, demeanor is only one of several factors which should be considered in evaluating the credibility of a witness. Certainly the internal consistency of the witness's testimony, the presence or absence of corroboration, and whether the witness has a motive to testify in a certain way are all significant indicators of credibility which can be assessed without observing the witness. The Senate might consider whether review of a videotape is an adequate substitute for observation of live testimony by the full Senate. The advent of sophisticated video equipment provides the opportunity to observe the testimony of witnesses, perhaps even more closely than one could if one attended the hearing at which the testimony was originally offered.

22 See Response of the House Managers to the August 10, 1988 Letter from the Senate Committee on Rules and Administration [hereinafter "House Managers' Response"] at 6-7.

23 United States Constitution, Art. III, sec. 2, cl. 2.

24 See e.g., South Carolina v. Regan, 104 S.Ct. 2148 (1984); Illinois v. Missouri, 384 U.S. 924 (1966).

(H) Judge Hastings' Response to House Managers' Statement [35]

8. We continue to hold the firm view that the Senate cannot and should not attempt to delegate responsibility for the receipt of the evidence presented in the trial of this impeachment. Under that view, there would be no occasion to consider the problems incidental to any bifurcation of the receipt of evidence. Were this view rejected, however, we think the managers substantially underestimate the ability of the Senate to assess the relative importance of certain testimony and the relative significance of the various articles of impeachment. The necessary assessment could not, however, be made until the Senate had before the final pleadings and the full list of witnesses the parties anticipate calling. We also think the methods suggested by the managers for keeping the Senators informed simply illustrate the practical and constitutional infirmities of the use of Rule XI committee in this case.

9. Only one of the methods proposed by the managers for keeping Senators informed could materially reduce the unfairness inherent in the use of a Rule XI committee in the trial of this impeachment. The delivery of opening

[35] See footnotes 15 and 16.

statements by the parties, followed by a replay of a videotape that projected *all* proceedings during which admissible evidence was received by a Rule XI committee, followed by closing arguments before the full Senate would replicate the required trial process as nearly as possible. It would also require all Senators to hear and consider the evidence in a public forum so that the public as well as the accused could be satisfied that the resulting judgment reflected the verdict of Senators who had heard and considered the evidence admitted at trial. We do not, however, think that the minor efficiencies that might be achieved by editing out "tape delays" could justify departures from established practice, departures that would, at a minimum, deprive the accused of the right to confront the witnesses against him in the presence of the jury. The other methods suggested by the managers share fundamental defects that illustrate constitutional doubts that permeate the Rule XI procedure.

10. The use of a Rule XI committee permits the Senate to continue the legislative business simultaneously with the conduct of an impeachment trial. For precisely that reason, it deprives the accused of the attention to the evidence that is afforded by a trial before the full Senate. Individual Senators may, of course, be inattentive during a trial before the full Senate. They cannot, however, claim the excuse that their duty to participate in legislative business being conducted by the Senate, on the floor or in committee, precluded the proper performance of the duties the Constitution imposes upon them as members of the high court of impeachment. Moreover, the ongoing burdens of the legislative business diminishes any prospect that Senators would in reality have time to study and deliberate upon recorded evidence, whether submitted in transcript or videotape form or both. The Senate has not yet developed procedures for expanding the number of hours in the day or days in the week, and it borders upon the frivolous to suggest the Senators presently have excess time sufficient to enable them to read substantial transcripts or view videotapes of extended committee proceedings while they are performing the duties incident to ongoing legislative business.

11. In any event, these methods would impair the right of the public and the accused to hold their elected officials accountable for the proper discharge of their duties in executing the public business. At a public trial before the full

Senate, the public may observe and the media will report the attendance and attention given by the members. There is no comparable record to inform the public concerning the attention given transcripts or videotapes by individual Senators. A public trial before the full Senate provides such assurances as are possible that the resulting deliberations and votes were based upon the evidence and arguments presented at trial, rather than upon secondary accounts or briefings given in private by staff or, worse, by those with an interest in the outcome.

12. As the managers suggest,[11] bifurcation of the pretrial proceedings and the trial proceedings may be appropriate. A Senate committee might play a significant role in the pretrial proceedings that would aid the Senate in conducting a fair and orderly trial without any unnecessary consumption of time or delay. Such a committee might usefully be employed to conduct proceedings necessary to develop a record upon which the Senate could properly consider pretrial motions. Such a committee might usefully be employed in resolving disputes over discovery and assuring that Judge Hastings is afforded access to the records necessary to enable him to prepare for trial. Such a committee might usefully be employed to conduct proceedings necessary to establish the authenticity of documents and to create a record upon which the Senate might determine significant evidentiary questions, such as those likely to arise from the House's planned use of a "linguistics expert" to express expert opinions on how the Senators should interpret a brief recorded telephone conversation between Judge Hastings and Mr. Borders.[12]

13. Although we agree that the Senate may find it useful to designate a committee to conduct certain pretrial proceedings, we do not believe that the Senate should undertake to designate its members or define its role until the pleadings have closed and the issues to be addressed have been defined by the pretrial motions presented by the parties. In the absence of the House or any managers authorized to act on its behalf, such a committee could not, in any event, act after the adjournment of the 100th Congress. When the 101st Congress convenes and the Senate has the parties' motions and the managers appointed by the new House before it, the Senate may then better determine what functions, if any, might properly be delegated to a pre-trial committee and which Senators should be designated to serve.

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11. Managers Mem. at 5 and 8 (recognizing distinction, but improperly suggesting pretrial proceedings may continue after adjournment of 100th Congress).

12. Managers Mem. at 11 (identifying Professor Roger Shuy as an anticipated witness).

(I) Comments of Congressional Research Service [36]

USE OF COMMITTEE

The second question which the Senate requested the Committee on Rules and Administration to study was "the appropriate use, in the pending impeachment, of Senate Impeachment Rule XI."[36]

The rule and its history. Under rule XI, in an impeachment trial, the Senate may order the presiding officer to appoint a committee of Senators "to receive evidence and take testimony...." For this purpose, the committee and its chairman exercise all the powers of the Senate under the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials. The committee is to report to the Senate in writing by means of a certified copy of the transcript of the proceedings and testimony given before the committee and "such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate...." The rule specifies that it does not bar the Senate "from sending for any witness and hearing his testimony in open Senate...." The rule also reserves the right of the Senate to order that the entire trial be conducted before the full Senate.

Rule XI was adopted on May 28, 1935.[37] The 1935 resolution was identical to one reported in 1934 in the previous Congress, but which was not adopted

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[36] 134 Cong. Rec. S 11170 (daily ed. August 9, 1988).

[37] 79 Cong. Rec. 8309-10 (1935).

[36] See footnote 18.

then because debate was cut short on the measure.[38] The rule was intended to permit the Senate to provide for the appointment of a committee of Senators "who would go into the country and take the testimony rather than bring the witnesses to the Senate....The committee would make no recommendations or conclusions and issue no report to the Senate except the certified copy of the transcript."[39] In preparation for the 1986 Claiborne impeachment trial, the Senate adopted a series of amendments to its impeachment rules, including two minor amendments to rule XI.[40] First, to make it clear that when it is desired to have a committee take evidence, it must be ordered by the Senate, the phrase "if the Senate so orders" was substituted for the former language, "upon the order of the Senate."[41] And second, the former requirement specifying that the committee be composed of twelve Senators was deleted so as to leave the committee's composition to be set by the Senate "in accord with the needs of the situation."[42]

The Claiborne Impeachment. The rule XI procedure was apparently not employed in the 1936 impeachment proceedings against Judge Halsted Ritter, but was first utilized in the proceedings against Judge Harry Claiborne. The Senate on August 14, 1986, adopted a resolution authorizing the presiding officer to appoint a committee of twelve Senators to receive evidence and take

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38 The history of the rule up to 1974 is summarized in a September 3, 1974, CRS report, "Evolution of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials," by Robert Thornton. The report is reprinted in S. Rept. No. 93-1125, 93d Cong., 2d Sess. 54, 63-66 (1974).

39 S. Rept. No. 93-1125, supra, at 65.

40 S. Res. 479, 99th Cong., 2d Sess., 132 Cong. Rec. S 11902 (daily ed. August 15, 1986).

41 S. Rept. No. 99-401, 99th Cong., 2d Sess. 5 (1986).

42 Id.

testimony. The majority and minority leaders each recommended six Members to the presiding officer.[43] Claiborne's lawyer, Oscar Goodman, filed with the Impeachment Committee a pre-trial motion to declare rule XI unconstitutional, and argued that the trial function could not be delegated to a committee.[44] The committee chairman, Senator Mathias, ruled that the committee lacked authority to grant or deny the motion and instead determined that the motion would be referred to the Senate when the committee reported the evidence that it had received.[45] Goodman renewed his motion before the Senate,[46] which, following argument by Goodman[47] and Rep. Hughes, a manager for the House,[48] agreed to a motion by Senators Heflin and Warner to postpone the decision on this and several other motions made by Goodman until the conclusion of the presentation by the managers and the defendant.[49] The Senate subsequently considered the motion concerning rule XI in closed session[50] and when the Senate resumed its proceedings in open session it adopted, by a vote of 61 to 32, a motion offered by Senator Dole that the Senate not hear additional

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43 S. Res. 481, 99th Cong., 2d Sess., 132 Cong. Rec. S 11673 (daily ed. August 14, 1986).

44 Hearings Before the Senate Impeachment Trial Committee, 99th Cong., 2d Sess. (1986), Part 1 at 240 (motion), 83 et. seq. (argument of counsel). See also id. at 460-61 (House motion in opposition to Claiborne rule XI motion).

45 Id. at 112-13.

46 132 Cong. Rec. S 15485 (daily ed. Oct. 7, 1986).

47 Id.

48 Id. at S 15487.

49 Id. at S 15491.

50 132 Cong. Rec. S 15557 (daily ed. October 8, 1986). See also 1986 Cong. Quarterly Almanac at p. 80.

witnesses in the case.[51] The decision of the Senate not to hear any additional witnesses[52] was apparently an implicit rejection of Goodman's motion to declare rule XI unconstitutional, since without hearing witnesses itself, the Senate would have had to rely on the evidence and testimony received by the committee. Senator Specter, in a statement following the Senate vote to impeach Claiborne, indicated that the vote on the Dole motion was a response to Goodman's motion to declare rule XI unconstitutional.[53]

In last-minute court appeals, Claiborne sought to restrain the Senate from voting on his impeachment, challenging, inter alia, the use of the committee to take testimony. In apparently unreported, brief orders, the courts declined to grant Claiborne the relief he sought.[54]

Analysis. As noted above, questions concerning the constitutionality of rule XI were raised during the Claiborne impeachment proceedings. The pertinent constitutional provision is art. I, § 3, cl. 6, which states: "The Senate shall have the sole power to try all impeachments....And no person shall be convicted without the concurrence of two thirds of the Members present." On the one hand, it might be argued, as Claiborne's counsel urged, that this

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51 132 Cong. Rec. at S 15557.

52 In response to a question by Senator Levin as to whether Dole's motion barred "any additional witnesses", Senator Dole responded in the affirmative. Id. (emphasis added).

53 132 Cong. Rec. S 15767 (daily ed. October 9, 1986).

54 Claiborne challenged the Senate's procedure in the U.S. District Court for the District of Columbia, which ruled against him on October 8, 1986. See 132 Cong. Rec., S 15767 (daily ed. October 9, 1986) (remarks of Senator Specter). An emergency appeal to the U.S. Court of Appeals for the District of Columbia was denied and, finally, both Chief Justice Rehnquist and Justice Marshall denied his request for a stay of the Senate proceedings. Claiborne v. United States, No. A-275 (U.S. October 9, 1986). See also 44 Cong. Quarterly 2569 (October 11, 1986).

provision vests in the full Senate the responsibility for trying an impeachment, and the Senate is not authorized by the provision to delegate this responsibility to a committee.[55] "The one who decides must hear"[56] and, according to this argument, as the trier of fact, each Senator must be familiar with the evidence, and it is impermissible to use a committee as a "filtering" device to receive evidence that is then submitted to the full Senate.[57] Furthermore, it is particularly important for each Senator to hear the evidence in a case that may turn on the credibility of witnesses.[58] On the other hand, it might be argued, as did the House managers in the Claiborne case, that apart from the requirement of a two-thirds vote for conviction, the Constitution does not specify the particulars of an impeachment trial and the Senate has inherent authority, as the trier of fact, to establish rules governing the manner in which evidence is to be received. Setting up a committee to receive evidence is arguably within the discretion of the Senate.[59] And in the Claiborne case, the House managers argued that it was not always necessary for the trier of fact to see and hear a witness' testimony in order to determine his credibility since credibility might be judged on other factors, such as documentary evidence or inconsistent statements. Finally, in the Claiborne case, a video tape was available for Senators who wanted to review the testimony of witnesses.[60]

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55 See Hearings Before the Senate Impeachment Trial Committee, supra note 44, Part 1 at 240; 132 Cong. Rec. S 15485-87 (daily ed. October 7, 1986).

56 Morgan v. United States, 298 U.S. 468, 481 (1936).

57 132 Cong. Rec. at S 15485.

58 Hearings Before the Senate Impeachment Trial Committee, supra note 44, Part 1 at 242.

59 Id. at 460-61.

60 132 Cong. Rec. S 15487 (remarks of Rep. Hughes).

Following the Senate action in voting to convict Claiborne on three of the four articles of impeachment exhibited against him by the House, one Member indicated that, in his view, the rule XI procedure was acceptable in the Claiborne case since Claiborne had been convicted in the courts on the basis of the same key facts underlying the offenses for which he was impeached. However, the Member expressed "serious doubts" about the use of the rule XI procedure if factual determinations crucial to the articles of impeachment had not previously been established by a court.[61] Thus, the arguments against the rule XI procedure may possibly be stronger in a case like that of Judge Hastings, who has been acquitted in a criminal trial, than in a case such as that of Judge Claiborne, who had been convicted in a criminal prosecution.

There appears to be a split of authority as to British precedents concerning the use of committees in impeachment proceedings. A memorandum prepared in 1986 at the request of the Senate Legal Counsel by the Law Library of the Library of Congress concluded that the examples it cited "support the conclusion that while a trial of impeachment was held before the full House of Lords, examination of witnesses was sometimes conducted by a committee of the House in preparation of the trial."[62] However, in his treatise on impeachment, Raoul Berger states:

> No trace of a reference to a committee of the Lords for hearing of the evidence turned up in my search of impeachment proceedings. The reason appears in a statement made by the Managers of the Lords at a conference between

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61 132 Cong. Rec. S 15762-63 (daily ed. October 9, 1986) (remarks of Senator Bingaman).

62 "Taking of Evidence Before a Committee of the House of Lords During Impeachment Proceedings", by Kersi Shroff, Senior Legal Specialist, American-British Law Division, Law Library, Library of Congress (Sept. 1986), reprinted in Hearings Before the Senate Impeachment Trial Committee, supra note 44, at 87-9.

> members of the Lords and the Commons (reported January 18, 1691) that "In the case of impeachments, which are the groans of the people...and carry with them a great supposition of guilt than any other accusation, there all the Lords must judge."[63]

Berger acknowledges that the American impeachment process, unlike that in England, is not criminal in nature,[64] but asserts that English procedure should nevertheless provide the model for our impeachment proceedings.[65]

By way of analogy, it may be noted that both the House and Senate have delegated to committees the responsibility for receiving evidence and taking testimony for a variety of purposes. Bills, of course, are routinely referred to committee for consideration,[66] and a committee in holding legislative or oversight hearings may take testimony and compel the attendance of witnesses and the production of documents.[67] But, more importantly for present purposes, committees also receive evidence and take testimony where the House or Senate is performing a quasi-judicial function. In cases of exercise of the inherent contempt power, although generally the proceedings appear to have been conducted at the bar of the House of Congress involved, in at least a few instances proceedings were conducted either initially or primarily before a committee, with the final decision as to whether to hold the person in contempt

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[63] Berger, Impeachment: The Constitutional Problems 171 (1973), citing and quoting 4 Hatsell, Precedents of Proceedings in the House of Commons 343, 333, 342 (1796). For a more detailed treatment of English precedents, see Williams, The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials, 50 N.Y.U.L. Rev. 512 (1975).

[64] Berger, supra, at 170, 171.

[65] Id. at 171-72.

[66] Senate rule XIV, cl. 3; House rule X, cl. 1.

[67] Senate rule XXVI, cl. 1; House rule XI, cl. 2(m).

being made by the full House.[68]

Although Art. I, § 5, cl. 2, of the Constitution specifically vests in "each House" the authority to "punish its Members for disorderly behavior, and, with the concurrence of two thirds, expel a Member," nevertheless both the House and Senate have delegated to committees substantial responsibilities in regard to this constitutional duty. The Senate Select Committee on Ethics is to "receive complaints and investigate allegations of improper conduct...and...make appropriate findings of fact and conclusions with respect thereto [and] recommend to the Senate... [appropriate] disciplinary action...."[69] The Senate Ethics Committee is specifically authorized to hold hearings, to take testimony, and to compel the attendance of witnesses and the production of documents.[70] Similarly, the House Committee on Standards of Official Conduct is authorized "to investigate...any alleged violation, by a Member, officer, or employee of the House, of the Code of Official Conduct or of any law, rule, regulation, or other standard of conduct applicable to the conduct of such Member, officer or employee..., and after notice and hearing, to recommend to the House...such action as the Committee may deem

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[68] For example, in 1865, the House appointed a select committee to inquire into an alleged breach of privilege committed by Mr. A.P. Field for assaulting a member of the House. Cong. Globe, 38th Cong., 2d Sess. 371 (1865). After taking testimony, the committee recommended, and the House adopted, a resolution directing the Speaker to reprimand Field at the bar of the House. Id. at 971, 974.

In a case involving a due process challenge to the procedure employed by a state legislature in a contempt proceeding, the U.S. Supreme Court observed that "the customary practice in Congress has been to provide the contemnor with an opportunity to appear before the bar of the House, or before a committee, and give answer to the misconduct charged against him." Groppi v. Leslie, 404 U.S. 496, 501 (1972) (emphasis added).

[69] Senate Manual, 100th Cong. § 79

[70] Id.

appropriate...."[71] The House Committee on Standards of Official Conduct, like other standing committees of the House, may take testimony, and compile the appearance of witnesses and the production of documents.[72]

While Article I, § 5, cl. 1 specifically authorizes "each House" to "be the judge of the elections, returns and qualifications of its own Members," in both the House and Senate, committees play critical roles in contested election cases. A statutory provision authorizes the Committee on House Administration to hear contested election cases "on the papers, depositions, and exhibits filed with the Clerk."[73] Acting upon reports of the committee, the House then disposes of the case.[74] In the Senate, the procedure for handling contested election cases varies somewhat from case to case,[75] but "resolutions and petitions of contest are usually referred today either to the Committee on Rules and Administration...or to the Select Committee on Standards and Conduct...."[76] The full Senate can act upon a resolution reported by the Committee.[77]

Conclusion. Senate impeachment rule XI was adopted in 1935 and was first employed in the Claiborne impeachment in 1986. In that case, the Senate rejected constitutional challenges to the rule, but one member had serious

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71 House rule X, cl. 4(e)(1).

72 See House rule XI, cl. 2(m).

73 2 U.S.C. § 392(a).

74 Deschler's Precedents, vol. 2, Ch. 9, § 2.

75 See Senate Election, Expulsion and Censure Cases from 1793 to 1972, S. Doc. No. 92-7, 92 Cong., 1st Sess., at vii, viii (1972).

76 Id. at viii. (In 1977, the Senate Select Committee on Standards was replaced by the Select Committee on Ethics.)

77 See Riddick, supra note 15, at 559.

doubts about the use of a committee in a case in which the key factual determinations underlying the articles of impeachment had not been previously established by a court.

The use of a committee to receive evidence in an impeachment case would generally seem to be consistent with the practice of both the House and Senate of directing committees to receive evidence and testimony to assist the full body in performing quasi-judicial functions.

(J) Parties' Comments re Proposed Witnesses

The Committee believes it would be helpful in its consideration of the issue of appropriate use of Rule XI in the pending impeachment that it have more detailed information regarding the intentions of the parties. The parties were requested, therefore, to include in their statements their tentative intentions regarding the witnesses they plan to call in the Senate trial, whether it be before the full Senate or an impeachment committee. Their statements follow.

(1) Statement of House Managers [37]

With respect to the number of witnesses the House Managers intend to call, the nature of their testimony, and the amount of time required for the presentation of the case of the House of Representatives, the House Managers must emphasize the tentative nature of this response. The composition of the witness list, the number of witnesses, and the testimony sought to be elicited from a particular witness are all subject to revision as trial approaches and, indeed, even in the course of trial. With this cautionary note in mind, the House Managers estimate that 10 to 12 trial days will be required to present the case on behalf of the House of Representatives. The Managers anticipate that the following witnesses will be called at trial.

[37] See footnotes 14 and 16.

1. Hemphill Pride. Mr. Pride will testify about the events of October 9, 1981; his lack of knowledge of a letter writing campaign by Judge Hastings on his behalf; and that he did not have access to particular phones identified by Judge Hastings at the judge's criminal trial.

2. William Murphy. Mr. Murphy was the FBI agent in charge of the investigation into the bribery conspiracy. He will testify about the investigation, including the FBI's attempts to interview Judge Hastings on October 9,1981.

3. H. Paul Rico. Mr. Rico is a former FBI agent who acted in an undercover capacity as Frank Romano. He will testify about his contacts with William Borders.

4. John Simmons. Mr. Simmons was the FBI agent who interviewed Judge Hastings in Florida late in the evening on October 9, 1981. He will testify to the details he learned regarding Judge Hastings' actions after the judge returned to Florida from Washington, D.C.

5. Jeffrey Miller. Mr. Miller is a former law clerk to Judge Hastings. He will testify to facts surrounding the drafting and issuance of the forfeiture orders in the case of United States v. Romano.

6. Daniel Simons. Mr. Simons is a former law clerk to Judge Hastings. He will testify about the issuance of the October 6, 1981 forfeiture order in the case of United States v. Romano.

7. Shirley Ross. Ms. Ross was Judge Hastings' date on September 11, 1981 in Washington, D.C. She will testify about the circumstances of Judge Hastings' arrival at her home that evening.

8. Donna Myrill Mendez. Mrs. Mendez was present at the Sheraton Hotel on September 12, 1981, with Judge Hastings and others. She will testify about the events of that evening.

9. Pearl Dabreau Mapp. Mrs. Mapp was present at the Sheraton Hotel on September 12, 1981, with Judge Hastings and others. She will testify about the events of that evening.

10 Madeline Petty. Ms. Petty accompanied William Borders to

the Leonard-Hearns championship fight in Las Vegas, Nevada on September 16, 1981. She will testify about the trip and its planning.

11. Essie Thompson. Ms. Thompson accompanied Judge Hastings to the Fontainebleau Hotel on September 16, 1981. She will testify about that evening.

12. Wendy Loucks. Ms. Loucks was one of the FBI agents that surveilled the Fontainebleau Hotel on September 16, 1981. She will testify about what she observed that evening.

13. Carolyn McIver. Ms. McIver is a social friend of Judge Hastings residing in Columbia, South Carolina. She will testify that Judge Hastings could not have reached Hemphill Pride at her telephone number, contrary to Judge Hastings' testimony at trial.

14. Andrew Chisholm. Mr. Chisholm is a resident of South Carolina. He will testify that William Borders could not have reached Hemphill Pride at Mr. Chisholm's telephone number, contrary to Judge Hastings' testimony at trial.

15. Eleanor Golar-Williams. Ms. Golar-Williams is the former mother-in-law of Patricia Williams, one of Judge Hastings' counsel. She will testify that Judge Hastings could not have reached Hemphill Pride at her telephone number, contrary to Judge Hastings' testimony at trial.

16. Roger Shuy. Professor Shuy, of Georgetown University, is a linguistics expert. He will testify that Judge Hastings and William Borders engaged in a coded conversation on October 5, 1981.

17. Senora Avery (or substitute). Ms. Avery will describe how a Hobic computer records telephone calls made from hotel rooms.

18. Airline Records Specialist. This witness will explain the information contained on airline reservation histories.

19. Stephen Clark. Mr. Clark is Mayor of Dade County, Florida. He will testify that Judge Hastings disclosed to him confidential information, which other witnesses will establish was obtained through a Title III wiretap.

20. Roberto Martinez. Mr. Martinez was the Assistant United States Attorney who applied for authorization for a Title III wiretap from Judge Hastings and presented subsequent progress reports to the judge. He will testify that Judge Hastings expressed a particular interest in the information contained in the reports that Kevin "Waxy" Gordon was talking about Mayor Clark. Mr. Martinez also participated in the decision to terminate certain undercover investigations as a result of the disclosure of confidential information.

21. Christopher Mazzella. Mr. Mazzella was the FBI agent in charge of the public corruption unit in Miami, Florida. He will testify about the undercover investigations for which the wiretap was authorized, the investigation of the wiretap leak and his attempt to interview Judge Hastings.

22. Geoffrey Santini. Mr. Santini was the FBI case agent for the undercover investigations for which the wiretap was authorized. He will testify about presenting Judge Hastings with an application and affidavit to extend the wiretap, at which time the judge commented to the affect that "Waxy" Gordon was going to get Mayor Clark in trouble by talking so much.

23. Monsignor Bryan Walsh. Monsignor Walsh attended the Metropolitan Miami Action Plan meeting during which Judge Hastings disclosed the wiretap information to Mayor Clark. Monsignor Walsh will testify that Mayor Clark and Judge Hastings were together with him prior to Judge Hastings' speech on the morning of September 6, 1981.

The House Managers must emphasize that the foregoing list is not exhaustive. In the course of compiling the list, additional witnesses were considered and not set forth because it is not the House Managers' present intention to call them. This judgment, however, may change depending on how the trial progresses.

In addition, it is not the House Managers' present intention to call any witness who could legitimately invoke any evidentiary or constitutional privilege. This is also only a preliminary determination and might be reconsidered at a later date.

(2) Statement of Judge Hastings [38]

Basic fairness, as well as precedent, dictate that the House should be required to disclose the names of the witnesses it intends to call before the accused is required to decide and report the witnesses whom he or she will call in response.[31] Nonetheless, we recognize that the Senate needs to plan for the proceedings that will be necessary to dispose of the pending articles and that the Committee properly seeks any information that may aid it in formulating recommendations that may assist the Senate. We offer the following preliminary estimates with that in mind.

1. *The Witnesses and the Nature of Their Testimony:* Absent prior specification by the House, it is impossible and would be inappropriate for Judge Hastings to determine or specify the witnesses he may call for his defense. Nonetheless, the fact that fifteen of the articles concern matters that were the subject of the 1983 trial makes it possible to

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31. See, e.g., Impeachment Procedure 182 (precedent noted).

[38] See footnotes 15 and 16.

forecast the kinds and number of witnesses that may be necessary. In our present view, the necessary witnesses fall into four categories:

a. Almost sixty witnesses testified at the 1983 trial -- seventeen for the prosecution and more than forty for the defense. Judge Hastings would anticipate that he would call a comparable number of witnesses in his defense to the first fifteen articles and might have to call some of the prosecution witnesses, if they were not called by the House. The particular witnesses called might well differ from those called in 1983 in view of the passage of time and the particular witnesses chosen by the House, but the aggregate number is unlikely to vary significantly. Through the post-trial investigations by the judiciary and the House, in so far as we are aware, only five additional witnesses who could competently testify to arguably relevant facts have been identified. Judge Hastings does not believe that the testimony that could be supplied by these witnesses would require him to call more than a few additional witnesses in response.

b. The post-trial investigations have made it clear that Judge Hastings should have been permitted to call witnesses in support of his "rainmaking" defense. At that, trial Judge Hastings sought to compel the government to produce its informant, William Dredge, and also sought to introduce evidence to show that all judges were vulnerable unfounded claims made by a few corrupt lawyers. Such lawyers, "rainmakers" as they were styled, make unfounded claims that they have the power to fix a case before a judge in exchange for a bribe in order to extract exorbitant amounts from an unsuspecting client.

The prosecution opposed the production of Dredge, representing that he was unavailable and that he had no material information. The trial judge upheld that objection. The prosecution objected to introduction of the "rainmaking" defense, and the trial judge ruled that Judge Hastings would not be permitted to use the defense or offer evidence in support of it, unless he could first prove that Borders had also held himself out having the power to fix cases before judges other than Judge Hastings. Judge Hastings was unable to satisfy the conditions imposed by the judge, and his rainmaking evidence was excluded.

The hearings before the five-judge committee that conducted the post-trial investigation demonstrated that Bor-

ders had held himself out as having the power to fix cases before other judges and that the prosecutors had known this when they objected at the 1983 trial. The government produced Dredge for the five-judge committee, and Dredge testified that Borders had indeed claimed that he had the power to fix cases before judges other than Judge Hastings. The government has since acknowledged that, prior to the trial, the FBI had conducted at least one investigation concerning Borders's claims with respect to another judge.

On this basis, Judge Hastings expects to ask the Senate to compel the production and testimony of William Dredge and to introduce testimony concerning "rainmaking" comparable to that which was excluded at his trial. We estimate that this would require the testimony of an additional three-to-five witnesses.

c. Judge Hastings cannot estimate the number of witnesses, other than himself, from whom testimony concerning the allegations set out in article XVI would be required with any confidence. At prior hearings, however, he has deemed his testimony and that of one or two additional witnesses sufficient. At a trial on this article, he would not anticipate that the number of witnesses he would call exceed the number called by the House.

d. The Senate may have to exercise its subpoena and contempt power to obtain the testimony of two witnesses whose testimony would aid judge, but who may be difficult to locate or reluctant to testify or both. As part of its plea bargain, the Justice Department agreed that William Dredge would not have to testify before any forum. At trial, the prosecutors claimed that they were unaware of his whereabouts and that he had no material information. He was, however, produced for the five-judge committee, apparently by FBI agent William Murphy. Mr. Dredge was forced to testify, and his testimony provided crucial missing links supporting several of the judge's claims. The Senate may have to subpoena FBI agent William Murphy or John Doar to determine the location of Mr. Dredge.

William Borders is a central witness. If he agreed to and did testify truthfully, his testimony would fully exonerate the judge. He refused to testify before the House subcommittee, and the subcommittee declined to pursue the matter. To date, Mr. Borders has refused to testify before any fo-

rum concerning the accusations made in the 1981 indictment and restated in the House's 1988 articles.[32]

Assuming that the House sought to prove its allegations by calling those witnesses who can competently testify to relevant facts, we anticipate that much of the information necessary to the judge's defense could be elicited through cross-examination. Moreover, there will be some duplication among the witnesses in the categories identified above, which should make it feasible for Judge Hastings to reduce the total number further. In that event, the number of witnesses necessary for the defense might be substantially fewer than the number indicated by the foregoing estimates. On this assumption, we believe that the aggregate number of witnesses called by the defense may be fewer than forty.

2. *Time*: Again, we are handicapped by a lack of information from the House. At present, we believe the direct testimony and other evidence in support of Judge Hastings's defense to all the allegations would be unlikely to consume more than forty to fifty hours of trial time and might less. In part, this estimate may depend upon the scope and extent of the information that is provided by the House before the trial and that the judge is permitted to develop through cross-examinations of witnesses called by the House during the trial.

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32. See Impeachment Report at 11-12 (for a summary).

(3) Additional Statement of Judge Hastings [39]

14. We have provided the Rules Committee with our considered estimates of the number of witnesses likely to be necessary for Judge Hastings's defense and of the amount of time their testimony is likely to require at trial. The records from the 1983 trial identify the witnesses called at that time. In response to a similar request from the House subcommittee during its hearings, we provided a comprehensive list that identified the universe of persons from whom we then thought testimony material to his additional defenses might be obtained and submitted memoranda identifying the points he sought to establish and the specific witnesses from whom the necessary testimony might be elicited.[13] Judge Hastings has made substantial disclosure, and the materials containing that disclosure should be available to the Rules Committee.

15. The procedures employed by the House subcommittee and the absence of discovery make it inappropriate, in counsel's view, for Judge Hastings to attempt to further specify witnesses he may call at this time. The House committee has not afforded Judge Hastings access to materials from which he might assess the need for and value of testimony that could be supplied by many of the potential witnesses. Moreover, information we have supplied to the House in the past has invariably been used to aid the House in developing a case against Judge Hastings. Never has the House used it for the purposes for which it had been requested or submitted -- to pursue avenues of inquiry or to permit the development of evidence that might support the judge's claim that he is an innocent victim. It is not Judge Hastings's job to aid his accusers in improving a case developed through a process that, in his view, has been and remains fundamentally unfair. Against that background, counsel for Judge Hastings do not believe disclosure beyond that previously given can fairly be requested or made at this stage of the proceedings.

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13. Hearings App. III at 251-67, 271-89 (list and memoranda specifying testimony sought).

[39] See footnotes 15 and 16.

(K) Committee's Finding and Recommendations

THE SENATE HAS AUTHORITY TO USE A COMMITTEE PURSUANT TO RULE XI OF THE SENATE IMPEACHMENT RULES

The recent proceedings against Judge Harry Claiborne, in 1986, resolved any doubt about the validity of Rule XI of the Senate Impeachment Rules. In that case, both the Senate and the federal courts rejected challenges to the use of the rule.

Implementation of the rule in the Claiborne case was consistent with the pertinent constitutional provisions found in article I, §3, cl. 6, which gives the Senate, ". . . sole Power to try all Impeachments . . ." and the Senate's power to determine the rules of its proceedings, granted by article I, §5, cl. 2 of the Constitution. These express grants of constitutional authority appear to give the Senate plenary authority to enact rules for trials of impeachments. It is reasonable for the Senate to employ a committee in an effort to manage the process of obtaining evidence and witnesses for the review by the whole Senate. Indeed, in other contexts, the Senate routinely relies upon committees to receive evidence.

As was explained in the discussion of the historical background for the rule, Rule XI is also consistent with British impeachment practice in the House of Lords. As Jefferson noted in his *Manual*,

> The practice is to swear the witnesses in open House, and examine them there; *or a committee may be named, who shall examine them in committee either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand.*[40]

The Committee's conclusion that the Senate may use a Rule XI committee to take testimony and receive evidence in an impeachment trial is supported by the Congressional Research Service and the House Managers. The House Managers state, "The House Managers are of the view that the appointment of a committee in an impeachment proceeding is a matter within the Senate's sound discretion." Respondent challenges the constitutionality of the rule but focuses his arguments on the issue of whether the rule should be applied in this particular case.

As the foregoing discussion shows, the Senate has the authority to appoint a Rule XI committee at any time and could do so before the adjournment of this Congress. The rules and precedents appear to suggest possible limitations and restrictions on the activities of such a committee during the period between sessions of Congress.

It is, of course, clearly established that the Senate is a continuing body and that its committees continue to function between Congresses.

> The Senate can and does order investigations, interim reports, final reports and recommendations of its committees, without reference to the ending of one Congress and the beginning of another. This procedure is not changed

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[40] *Manual*, Section 614. (Emphasis added). Cited, p. 299 of House Doc. 99-279, *Rules of the House of Representatives.*

even when there is some change in the composition of the committee membership.[41]

Senate Impeachment Rule III states that during Senate consideration of articles of impeachment, the Senate ". . . shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the Senate) until final judgment shall be rendered, and so much longer as may, in its judgment, be needful." The rule appears to contemplate that the Senate will be in session during the trial.

The committee has the legal authority to perform any function necessary to carry out its responsibilities under Rule XI; this would include the authority to receive testimony, during the adjournment period. While Senate Rule III and the precedent discussed above do not establish legal limitations on the Senate, it would appear to be advisable, in view of the foregoing, to limit the activity of an impeachment committee to organization and pre-trial matters during the period between Congresses.

Committee Recommendations

While the Committee finds that the Senate has authority to appoint an impeachment committee pursuant to Senate Impeachment Rule XI and that it could do so before the adjournment of this Congress, it recommends that the decision to appoint such a committee be made by the Senate as it is constituted in the 101st Congress. The Committee further recommends that such decision follow a hearing of this Committee the week of January 23, 1989 and a report of advice of this Committee which it proposes to issue on or about February 1, 1989.

While the Committee is mindful that this proceeding should not be delayed unnecessarily, it is concerned that it afford the parties and Members the opportunity to be heard on the procedural matters before it and that it have the benefit of the open exchange of views before it determines its proper advice and recommendations to the Senate. This can best be achieved in the context of a hearing. Inquiries indicate that it is not feasible to schedule a hearing in the time remaining of this Congress. Since this issue is important not only to the handling of the instant impeachment, but also to any that may follow, the delay occasioned by this recommendation is justified.

During the week of January 23, 1989, this Committee will conduct a hearing on the issue of the appropriate use of impeachment Rule XI in the pending case and issue a report on or about February 1, 1989 on that question as well as on any other matters which may assist the Senate in the fair trial of this case.

In view of the foregoing recommendations, the Committee urges that the Senate direct the parties, during the period between the adjournment of this Congress and the commencement of the proceedings in the 101st Congress, to make every effort to resolve to the fullest extent possible pretrial matters so as to narrow the issues and reduce the number of witnesses through, among other

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[41] Knowland, *Senate Rules and the Senate as a Continuing Body*, quoted in Goldstein memorandum, *Impeachment, Miscellaneous Documents*, 93rd Congress, p. 67 (Committee Print, 1974).

methods, stipulations of facts and of authenticity of documents; to submit to the Senate their report on such pretrial matters by February 20, 1989; and to that end, that the Senate advise the parties that it will make available the services of the Senate Legal Counsel to mediate differences.

V. Any Other Matter Which May Assist the Senate in a Fair Trial of the Pending Impeachment

(A) Introduction

This Committee was directed to report to the Senate on "any other matter which may assist the Senate in a fair trial of the pending impeachment." In order to identify areas of the process that should be reviewed to assure a fair trial, the Committee invited the parties to submit their suggestions, and also reviewed the record of the Claiborne impeachment trial for observations and recommendations of Members. In their statements to the Committee, the parties have made a number of suggestions concerning the procedures of the Senate. Following the Claiborne impeachment trial in 1986, many Members stated, on the floor of the Senate, their views, objections and recommendations concerning that trial and future trials. The remarks of the Members are collected in S. Doc. 99-48, pp. 301-374.

The Committee believes that the question of providing a fair trial is so important to the process that, as in the case of the appropriate use of Rule XI, it should give the parties and Members the opportunity to be heard, and the Committee the full benefit of their views and advice, before submitting its findings and recommendations to the Senate. The Committee therefore intends to submit a report of its advice and recommendations on these matters following a hearing at the outset of the next Congress.

The remainder of this section of the report, therefore, will set forth the comments of the parties and those expressed by some Members regarding procedures to assure a fair trial in the Senate.

(B) Statement of House Managers [42]

The House Managers intend to request admissions as to matters of fact and the genuineness of relevant documents. This practice is analogous to Rule 36 of the Federal Rules of Civil Procedure. The pending impeachment case is made up of a great many facts which in large measure are undisputed. It also involves a substantial number of documents whose authenticity should not be disputed. The purpose of this procedure is to reduce trial time by both narrowing issues that must be tried and eliminating issues where possible.

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[42] See footnote 14.

(C) Statement of Judge Hastings [43]

September 6, 1988

To: THE COMMITTEE ON RULES AND ADMINISTRATION OF THE UNITED STATES SENATE

Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Need for a Clear Statement that the Rules of Evidence Will Be Properly Applied and Proper Discovery Ordered

The Committee requested that we identify other matters which may assist the Senate in conducting a trial that is fair to Judge Hastings and to the House of Representatives. Early clarification on two points would enhance the prospect of a fair trial and facilitate the parties' efforts to prepare for it:

1. In all trials before the full Senate, the rules of evidence have been strictly applied. Their application is likely to be important here, especially to prevent the evidence from becoming infected with inadmissible and pernicious hearsay and improper or ill-founded opinions. Since the last full trial of an impeachment in 1936, however, the common law rules of evidence have significantly evolved and have been largely supplanted by codified rules -- in the federal system, by the Federal Rules of Evidence adopted by the Congress in 1975.[1]

We believe that the parties would be aided in preparing for, and the Senate would be aided in conducting, a trial in this impeachment if the presiding officer and the Senate were to specify whether the common law rules, as construed and applied in the courts and in prior impeachment trials, or the federal rules, as construed and applied in the courts, will constitute the primary authority to which the Senate would look for guidance in a trial of this impeachment. We recognize that such a preliminary ruling would not bind the Senate in the rulings that became necessary at trial, but we believe early specification would facilitate the parties' preparation and reduce the need for extended argument at trial.

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1 Codified as amended at 28 U.S.C. App. 678 (1982) and App. 127 (Supp. IV 1986).

[43] See footnote 15.

2. The House has traditionally permitted an accused official to participate in depositions taken in its inquiries and has supplied him or her with copies of statements and documents obtained. Where this is not done, we believe that the Senate has and must have the authority to correct the deficiency by ordering the House managers to produce depositions and other requested materials.

The House did not follow the customary practice in this inquiry. Apart from access to the record formally transmitted by the Judicial Conference and such additional documents as its special counsel thought appropriate, the House has failed to provide Judge Hastings with available material necessary to enable him to prepare his defense. In particular, the House requested and received numerous investigative files from the Judicial Council for the Eleventh Circuit (the "Council"), long after the certification by the Judicial Conference of the United States. In addition, we believe that the House obtained copies of memoranda and notes from interviews of potential witnesses that were conducted by Justice Department attorneys, FBI agents, and the Council's investigators. Moreover, the special counsel and his staff were authorized to and did take depositions and conduct interviews of potential witnesses in these proceedings. Thus, transcripts and memoranda documenting the statements made by those interviewed should also be available.

The production of this material is necessary to enable Judge Hastings to defend himself properly, and we believe that early production would facilitate necessary preparation and assure a more orderly trial. Accordingly, we suggest that the Committee recommend that the Senate enter an appropriate order directing their early production by the House.

We develop the first of these points below. We have been unable to complete our examination of the precedents and principles supporting the second within the time allotted. It is discussed only briefly below. We will forward a supplemental memorandum on this point shortly, if that seems necessary.

1. The Rules of Evidence

The principle that the rules of evidence applied in the courts must be strictly observed in the trial of impeachments has been long established and consistently followed by the Senate in this county and by the House of Lords in

England.[2] Ordinarily, there would be no need to report the history and reasons that led to the adoption of such a necessary and venerable principle. Some discussion seems appropriate here, however, for two reasons. First, there is ground for concern that the lessons of history may have been forgotten over the past fifty years. The proceedings in the House, for example, were conducted largely as if the House were acting upon a clean slate: The precedent and practices established in prior inquires were largely overlooked and ignored.[3] Second, there is ground for concern that some may view the rules of evidence and procedure as unnecessary shackles for an expeditious trial of an impeachment in the Senate and may have forgotten that many of the rules now followed by the courts can be traced to abuses and injustices that took place in the trial of impeachments in the House of Lords, long before our Constitution was adopted. Those who share this view may have also forgotten that arguments that the proceedings should not be encumbered by those strict rules have been regularly made and decisively rejected by the Senate in impeachment trials throughout the Nation's history. Those reasons suggest that the history and reasons that compel the application of those rules should be briefly recalled.

a. *Illustrations from history:* The issue was decisively resolved by the House of Lords in England early in the trial of the impeachment of Warren Hastings in 1788, and there-

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2 The English practice was noted in Jeffersons Manual, ch. III, reproduced in Constitution, Jefferson's Manual, and Rules of the House of Representatives, H. Doc. 403, 95th Cong., 2nd Sess. [hereinafter "Jefferson's Manual"], § 619 at 286. The principle is stated as established, and the precedents applying the rules of evidence in the trial of impeachment are reported, in "Rules of Evidence in Impeachment Trials," 3 Hinds' Precedents, ch. LXIX, § 2218 et seq., 537-643 (1907) (trials form 1797 to 1903), and in "Rules of Evidence in an Impeachment Trial, 6 Cannon's Precedents, ch. CXCIX, § § 493 et seq., 679-83 (1936) (to the same effect; extending report of precedents in trials through 1933). These sources are excerpted in House Comm. on the Judiciary, Impeachment: Selected Materials on Procedure, 93rd Cong. 2nd Sess. (Comm. Print 1974) [hereinafter "Impeachment Procedure"].

3 Indeed, the only place in the entire record of that inquiry where the precedents and practices were identified or discussed was in the memoranda submitted on behalf of Judge Hastings. See Hearings, App. III at 14-30, 44-46, 248-250, 294, 343, 432-36, 458-61 (discussions and citations); compare Hearings (the rest of the record) (absence of discussion or citation to precedent).

after applied throughout the trial.[4] As with the trial of this Hastings, the trial of that Hastings came after an extended period in which the impeachment process had not been used -- there a period of forty years.[5] The managers for the House of Commons in that case strenuously argued that proceeding showed be governed by "'. . . the natural reason of men, the principles of honor, the spirit of cavaliers . . . ; not the low principles of jurisprudence only.'"[6] Those in the House of Lords who took the point argued that "the law of parliament was not to be shackled by the rules of the courts below . . . ."[7] The House of Lords, however, rejected those arguments throughout the extended proceedings. In the words of the Lord Chancellor, "'. . . If we talk about the law and usage of parliament, and are bound by it, what injustices shall we not commit?'"[8]

The issues and similar arguments were forcefully presented to the Senate in the impeachment trial of United States District Judge James Peck in 1830. In that case, the roles were reversed. It was counsel for respondent who argued that the Senate should reject its prior practice and the practice adopted by the House of Lords in the trial of Warren Hastings and should not adhere to:

> the application of the rigid rules of evidence which governed the practice of courts of law . . .. [He argued that proceedings on impeachment] are not to be trammeled and hemmed in by rigid rules of evidence.[9]

It was the chairman of the managers for the House who urged the principle that had been, was, and should be adhered to be the Senate:

> . . . But the gentlemen seems to have forgotten that in that far-famed trial the very question was fairly made and decided; and it was held that the House

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4 The most readily accessible source giving the history of the proceedings is P. Marshall, The Impeachment of Warren Hastings (Oxford 1965) [hereinafter "Marshall"]. Professor Marshall provides citations to the original sources. See Marshall at 64-75.

5 Id. at 64.

6 Id. at 65.

7 Id. at 44.

8 Id.

9 See 3 Hind's Precedents § 2218, at 538 (quoting Mr. Wirt's argument).

> of Lords, when sitting as a high court of impeachment, was bound by the same rules of evidence which regulated the proceedings of the most inferior courts of the kingdom. The whole trial of Judge Chase proceeded upon the same principle.
>
> But even without precedent, could there by any doubt on this question? What sir? Against whom is it that this tremendous power of impeachment is invoked? Is it not against high state criminals? Men of standing and influence and character? . . . [Shall these] accused . . . enjoy rights and privileges and immunities which are denied to any ordinary citizen, when arraigned before the most inferior court of the land? We deny the existence of any power, even in this high court, to dispense with the rules of evidence. When the House of Representative become accusers, it is their right to have these rules administered here as they are administered by the Supreme Court and other tribunals in the country.[10]

The reasons why the rule had been adopted and persisted were eloquent by argued by one of the other managers in that case:

> I confess I feel alarmed to hear it gravely urged here that an impeachment is to be governed by other rules than the well-known and long-established rules of evidence. Rules of evidence are as much a part of the law of the land as any other part of it, and they constitute the security of every man. A more dangerous principle could not be broached, or a more alarming principle established than that, in the trial of an impeachment, the ordinary rules of evidence are to be relaxed; . . . . If this is to be done in favor of the respondent, will it be done in favor of him alone, or may not State favorites be shielded or State victims be destroyed by the same process?[11]

The Senate decisively reaffirmed the principle that the rules of evidence must be strictly applied in response to these arguments.[12]

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10 Id. at 539 (quoting Manager Buchanan).

11 Id. (uoting Manager Stonn).

12 Id.

The Senate has consistently applied the rules of evidence in impeachment trials, and it should continue the established practice here. The illustrations chosen merely identify the grounds for that commitment and make it clear that claims seeking departures from those rules typically reflect no more than the claimant's inability to marshall and present proper evidence. The Senate has consistently rejected such pleas, and it should reaffirm its commitment here. Indeed, the necessity for strict compliance here is far greater; If Judge Hastings is to be the first official to be reprosecuted by the House and retried by the Senate after having been prosecuted by the executive and acquitted in the courts upon the unanimous verdict of a jury, the new prosecutors can hardly claim that the rules of evidence should be *relaxed* to enhance the prosecution's chances the second time around.

b. *The rules to be applied*: There appear to be two views that the Senate might consider in providing guidance to the parties. First, the Senate might express the sense that the presiding officer and the Senate should look to the Federal Rules of Evidence, as generally construed and applied in the courts, in the conduct of the trial of this impeachment. Although time has not permitted a complete examination of the precedents, this would appear to conform to one view of the practice in prior impeachment trials. At those trials the common law rules applied were those recognized at the time the trial took place. It would also facilitate the work of the parties and the Senate by designating a comprehensive and readily accessible body of materials as the preferred source of guidance.

Second, the Senate might, in the alternative, express the sense that the common-law rules should remain the primary source, with primary reference to their application in prior impeachment trials and secondary reliance up on their application in the courts on points for which there was inadequate precedent in the Senate. This also would also be consistent with established practice. It would, however, require the parties and the Senate to rely upon sources that are less accessible and less well-known. As precedent, it might also limit the ability of the Senate to adapt the rules of evidence in impeachment trials to the contemporary practices developed by the courts in their on-going quest:

> to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of

> the growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined.[13]

Whatever the choice, we submit that the preparation and trial of the present impeachment would be facilitated by an early specification by the Senate of the sources to which it will, and that counsel should refer in applying the rules of evidence at trial. We have raised this concern in the memorandum for that reason.

2. The Necessary and Proper Discovery

Time has not permitted us to examine the precedents fully or to develop the applicable principles properly. Nonetheless, a few general propositions may be safely stated. The House has initiated accusatory proceedings in the Senate that require a trial. In so doing, the House has come before the bar of the Senate as a party-litigant, thereby voluntarily submitting to the jurisdiction of the Senate. Subject only to the limitations imposed by the Constitution, thare can be no doubt that the Senate has the power to control the proceedings and to make such orders as may be necessary to assure fairness to the accused as well as his accusers. Those principles along seem sufficient to establish that the Senate has the authority to enter appropriate orders compelling proper discovery.

The source to which the Senate should look for the general principles that should govern discovery in the present case also seem clear. Over the fifty years that have elapsed since the last major trial of an impeachment, the principles governing of pleading and discovery have evolved significantly in the courts. The Senate should look to contemporary notions of due process and fundamental fairness to determine what disclosure should be required here.

The need for discovery here is also apparent. For seven years, accusers from all three branches, all armed with compulsory process, have been investigating Judge Hastings. Judge Hastings has been denied the power and the resources necessary to conduct effective investigations of his own. Given the inordinate passage of time, it is clear that records have been destroyed and memories have dimmed. The evidence that remains is likely to be that gathered and preserved by his accusers.

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13 Rule 102, Federal Rules of Evidence.

Simple fairness requires that the accusers not be left in exclusive control of the only sources from which evidence relevant to the trial of an impeachment may be gathered. The nature and constitutional dignity of the proceedings are such that the evidence received gathered by the House should be made readily accessible to the accused. We submit that the Committee should recommend that the Senate enter such orders as are necessary to assure that Judge Hastings and his counsel are granted that access.

Conclusion

The concerns addressed in this memorandum are concerns which our prior dealings with representatives of the House have led us to conclude were likely to become significant. The memoranda being submitted by the House may alleviate these concerns and may, and likely will, suggest others. Based upon these memoranda and the respective replies, the Committee may itself identify further concerns that should be addressed or concerns that could be narrowed. If so, we would appreciate the opportunity to appear before the Committee so that the judge's news may be fully known and so that we may clarify any points that may be questioned by members of the Committee.

(D) House Managers' Response to Judge Hastings' Statement [44]

II. Pretrial Discovery Is Unnecessary and Unprecedented

The House Managers oppose pretrial discovery by either party to this impeachment proceeding. It is unnecessary because Judge Hastings has already been provided with thousands of pages of evidentiary material. Moreover, the House Managers have found no precedent for pretrial discovery in American or English impeachment proceedings, nor is there any reason to provide such an innovative procedure in this case. Finally, Judge Hastings' argument that he is entitled to pretrial discovery because the House of Representatives allegedly failed to adhere to its previous practices is without merit.[25]

In his Memorandum on Discovery, Judge Hastings asserts that "the House has failed to provide [him] with available material necessary to enable him to prepare his defense."[26] Yet, during the House of Representatives' investigation into Judge Hastings' conduct, and prior to the seven days of hearings conducted by the Subcommittee on Criminal Justice, the House provided Judge Hastings with a copy of its 14 volume Statement of Information.[27] That statement, written in paragraph form, sets forth a detailed chronology of the events in the bribery conspiracy and, even more importantly, contains virtually all the documentary evidence which was relied upon by the House of Representatives when it overwhelmingly voted to impeach Judge Hastings on Articles I through XV.[28] In addition to the 14 volume Statement of

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[25] Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Need for a Clear Statement that the Rules of Evidence Will Be Properly Applied and Proper Discovery Ordered, dated September 6, 1988 [hereinafter "Memorandum on Discovery"] at 2.

[26] Ibid.

[27] The Statement of Information is reprinted as Appendix II to In the Matter of the Impeachment Inquiry Concerning U.S. District Judge Alcee L. Hastings: Hearings before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess. (1988).

[28] One exception is a document prepared by staff based upon an interview of Dudley Williams. A copy of the interview report was provided to Judge Hastings prior to the vote by the Subcommittee on Criminal Justice on the 17 Articles of Impeachment. To the extent any additional materials were introduced into the record at the Subcommittee

[44] See footnotes 14 and 16.

Information, the House provided Judge Hastings with a copy of all court documents and grand jury material supporting Article XVI, which charges the judge with disclosing confidential information obtained from a Title III wiretap.

In his request for pretrial discovery, Judge Hastings also fails to mention that in advance of the House hearings he and his counsel had access to the evidence amassed by the investigating committees of the Eleventh Circuit. The House provided him with copies of the 2800 exhibits gathered by the Eleventh Circuit committee appointed to investigate the bribery conspiracy allegation, and a copy of the transcript of the testimony of the 100 witnesses heard by that committee. Judge Hastings also obtained a complete copy of the record of the Eleventh Circuit committee appointed to investigate the wiretap disclosure, which includes a transcript of all the testimony heard by that committee and the documentary evidence it obtained.

Finally, Judge Hastings has been provided with a transcript of and related exhibits pertaining to his criminal trial and the separate trial of William Borders. He also has had access to the trial transcript of United States v. Romano, the case which was the subject of Judge Hastings' and William Borders' bribery scheme.

Judge Hastings requests access to the House of Representatives' investigative files, to which he has no right. History establishes that the respondent in a House of Representatives impeachment inquiry has no right of access to such materials.[29]

In response to Judge Hastings' request for pretrial discovery, the House Managers also have researched both American and English precedent. That research discloses that discovery, or anything resembling such a practice, has never been a part of impeachment proceedings in the Senate or House of Lords. There was no pretrial discovery in the Senate proceedings involving former Judge Harry Claiborne, which was also a case arising under the Judicial Councils Reform and

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hearings, Judge Hastings was provided a copy.

[29] Conduct of Harry B. Anderson, United States District Judge, Western District of Florida: Hearing on H. Res. 191 and 305, Committee on the Judiciary, Special Committee, 71st Cong., 2d and 3rd Sess. (1930) 100-101.

Judicial Conduct and Disability Act of 1980.[30] Nor is there any evidence of pretrial discovery in earlier Senate impeachment proceedings.

With respect to English precedent, the House of Lords did not provide the respondent in an impeachment proceeding with even the bare minimum of information, let alone the wealth of information already provided to Judge Hastings in the present case. In the proceedings on the impeachment of Sir John Bennet in 1621, the House of Lords' procedures provided that the respondent would not even receive, prior to trial, the names of the witnesses to be called against him. Foster, The House of Lords, 1603-1649 (1983) 156-157. Similarly, in the proceedings on the impeachment of the Earl of Middlesex in 1624, the House of Lords refused to give the respondent a copy of the evidence presented by the House of Commons to the House of Lords' committee until after he answered the impeachment charge. Id. at 158.

This lack of precedent for pretrial discovery in an impeachment proceeding makes sense in light of the structure of our Government. The House of Representatives and Senate, like the House of Commons and the House of Lords, are coordinate parts of the Legislative Branch. The House of Representatives does not have the authority to order the Senate to act in a particular manner. Likewise, the Senate does not have the authority to compel the House of Representatives to take certain action, including the disclosure of investigative files to a respondent in an impeachment proceeding. The fact that the House of Representatives presents the Articles of Impeachment to the Senate for trial, as required by the Constitution, does not in any way limit its independent authority as one of the two houses of Congress.

Finally, Judge Hastings invents history in arguing that he should be entitled to pretrial discovery because the House of Representatives has failed to follow its established practice of allowing an "accused official" to fully participate in its investigations. Judge Hastings asserts:

> The House has traditionally permitted an accused official to participate in depositions taken in its inquiries and has supplied him or her with copies

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30 Former Judge Claiborne did make a Motion for Discovery during the Senate proceedings. In that motion, however, he requested materials which were not in the possession of the House of Representatives. The motion was not granted. Report of the Senate Impeachment Trial Committee, 99th Cong., 2d Sess. Part 1 at 115.

> of statements and documents obtained. Where this is not done, we believe that the Senate has and must have the authority to correct the deficiency by ordering the House managers to produce depositions and other requested documents.[31]

Judge Hastings fails to cite any authority for his statement of House practice. There is none. The House of Representatives does not allow an "accused official" in an impeachment investigation, or any other type of investigation, to participate in its inquiry. Even in the impeachment investigation of President Richard Nixon, the House did not allow the President's counsel to participate in its investigation.[32] Similarly, when the House Committee on Standards of Official Conduct conducts an investigation into a House Member or employee, counsel for the "accused official" does not participate in the taking of depositions or in any other type of fact gathering. Only when the Committee votes to hold a disciplinary hearing, does it provide the respondent with a copy of the evidence it intends to rely on at the hearing and any exculpatory information.[33]

Judge Hastings' argument that he is entitled to discovery based on a "deficiency" of House of Representatives' practice deserves no consideration. The House has conducted its impeachment investigation consistent with past practice and has done so in order to effect full and fair disclosure of relevant information.

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31 See note 25 supra.

32 J. Labowitz, Presidential Impeachment (1978) 190 n.30.

33 Rules of Procedure, House of Representatives Committee on Standards of Official Conduct (1987), Rules 18 and 19.

(E) Review of recommendations from the Claiborne trial

(1) Demeanor and the need to view witnesses

It was suggested that each Senator, as a fact finder, should see the witnesses. Under the Rule XI procedure, only the impeachment committee had the opportunity for direct observation. Some Senators noted that Members had the opportunity to view the demeanor of witnesses through videotapes of the impeachment committee hearings that were available to all Senators.

(2) Whether the Senate used undue haste and heard too few witnesses

The Senate voted 61-32 not to hear additional witnesses. That vote indicates solid support for the Senate's decision, but also a substantial amount of concern about the procedure.

Some Senators expressed other misgivings about how the trial was conducted. It was suggested that the Senate should have devoted more time to the case and that Senators had insufficient opportunity to weigh the evidence. There was concern that the Senate was basing its decision on an inadequate record and that the full Senate should have heard at least some witnesses.

(3) The degree of deference due a court's judgment in a Senate impeachment trial

The specific issue in the Claiborne case was the effect of his criminal conviction on the Senate trial. The issue is relevant to the present inquiry because the respondent in this case was acquitted in a criminal trial and has been the subject of other judicial proceedings.

In the Claiborne case, Article II required the Senate to vote to remove Judge Claiborne based on his tax conviction. (The vote on Article II was: 46 guilty, 17 not guilty, 35 answered "present", 2 did not vote. Impeachment Rule XXIII requires a vote of two-thirds of the Members present to convict.)

Several Senators stated that the Senate ought not merely accept a judgment of conviction by a court as sufficient to remove a defendent from office—the Senate had an independent responsibility to examine the facts in the case. It was suggested that the Senate would abrogate its constitutional role and destroy the doctrine of checks and balances if it deferred to the finding of another branch of the government.

Senator Mathias said of the Senate acquittal on Article III:

> . . . In this manner, the Senate covincingly recorded its conclusion that it should not delegate the impeachment function to the courts by making removal a further and automatic consequence of a criminal conviction. While we may hope that the courts will always be virtuous and correct in their judgments, our special function under the separation of powers does not permit us to reunite, in the judicial branch, powers which the framers thought should be separated.[45]

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[45] S. Doc. 99-48, p. 343.

Some Senators who believed that the Senate could accept the conviction as sufficient to remove Claiborne noted that the Senate is free to accept or ignore a jury verdict for whatever reasons the Senate thinks adequate and that acquittal in a criminal case does not bar an impeachment.

(4) What should be the standard of proof in an impeachment trial

It was suggested that the Senate should employ the reasonable doubt standard because the House was impeaching the judge based on criminal convictions.

Other Members noted that the Senate's vote rejecting the reasonable doubt standard demonstrated that the individual Members should decide for themselves the standard of proof and that, while they were free to adopt any standard they chose, they should not be instructed as to the standard they must use.

(F) Recommendation of the Committee

The Committee recommends that it conduct a hearing the week of January 23, 1989, to consider its advice and the recommendations to the Senate on other matters which may assist the Senate in a fair trial of the pending impeachment, and that it issue a report of its advice and recommendations to the Senate on or about February 1, 1989.

COMMITTEE ROLLCALL VOTE

In compliance with paragraph 7 (b) and (c) of rule XXVI of the Standing Rules of the Senate, the record of the rollcall vote in the Committee on Rules and Administration during its consideration of the original resolution to report favorably was as follows:

YEAS (9)	NAYS (0)
Mr. Ford	
Mr. Pell	
Mr. Inouye	
Mr. DeConcini	
Mr. Gore	
Mr. Moynihan	
Mr. Dodd	
Mr. Stevens	
Mr. Warner	

APPENDIX

99TH CONGRESS
2D SESSION

S. RES. 481

To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Harry E. Claiborne.

IN THE SENATE OF THE UNITED STATES

AUGUST 14 (legislative day, AUGUST 11), 1986

Mr. DOLE (for himself and Mr. BYRD) submitted the following resolution; which was considered and agreed to

RESOLUTION

To provide for the appointment of a committee to receive and to report evidence with respect to articles of impeachment against Harry E. Claiborne.

Resolved, Pursuant to rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve Senators to perform the duties and to exercise the powers provided for in the rule.

SEC. 2. The Majority and Minority Leader shall each recommend six Members to the Presiding Officer for appointment to the committee.

SEC. 3. Necessary expenses of the committee shall be paid from the contingent fund of the Senate from the appro-

priation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee.

SEC. 4. The committee shall be deemed to be a standing committee of the Senate for the purpose of printing reports, hearings, and other documents for submission to the Senate under rule XI.

SEC. 5. The Secretary shall notify the House of Representatives of this resolution.

WENDELL H. FORD, KENTUCKY, CHAIRMAN
CLAIBORNE PELL, RHODE ISLAND
ROBERT C. BYRD, WEST VIRGINIA
DANIEL K. INOUYE, HAWAII
DENNIS DeCONCINI, ARIZONA
ALBERT GORE, JR., TENNESSEE
DANIEL PATRICK MOYNIHAN, NEW YORK
CHRISTOPHER J. DODD, CONNECTICUT
BROCK ADAMS, WASHINGTON
TED STEVENS, ALASKA
MARK O. HATFIELD, OREGON
JAMES A. McCLURE, IDAHO
JESSE HELMS, NORTH CAROLINA
JOHN W. WARNER, VIRGINIA
ROBERT DOLE, KANSAS
E.J. (JAKE) GARN, UTAH
JAMES O. KING, STAFF DIRECTOR
WILLIAM McWHORTER COCHRANE, SENIOR ADVISER
GAIL S. MARTIN, CHIEF CLERK
WAYNE A. SCHLEY, REPUBLICAN STAFF DIRECTOR

United States Senate
COMMITTEE ON
RULES AND ADMINISTRATION
WASHINGTON, DC 20510-6325

August 10, 1988

The Honorable Peter W. Rodino, Jr.
The House of Representatives
Washington, D.C. 20515

Professor Terence J. Anderson
University of Miami School of Law
Coral Gables, Florida 33124

Dear Manager Rodino and Professor Anderson:

The Committee on Rules and Administration has been directed to report to the Senate by September 23, 1988, "on (a) the authority of the Senate to continue in the next Congress proceedings on the impeachment of Judge Alcee L. Hastings; (b) the appropriate use, in the pending impeachment, of Senate Impeachment Rule XI; and (c) any other matter which may assist the Senate in a fair trial of the pending impeachment." We would very much appreciate receiving from the parties memoranda which set forth their views on each of these matters.

It would be particularly helpful if the portion of your submissions addressed to item (b) included, in as much detail as is possible at this time, how many witnesses each side expects to call, the general nature of the testimony that is expected from each of them, and the amount of time that each side expects to require for the presentation of its case. We recognize that neither side should be precluded, by its submission of this preliminary information, from requesting process for other witnesses. It will be important to the Senate, however, in establishing procedures for the trial of this impeachment, to have adequate information about the evidence that the parties now intend to present.

Another matter on which information would be helpful to us is whether either side anticipates calling one or several witnesses who may assert a testimonial privilege, and whether immunity for any of those witnesses may be required and whether proceedings should be authorized to obtain their testimony.

In describing issues of particular concern to us we do not mean to limit the matters which you may address. Please provide us with any suggestions that you may have for the fair and expeditious trial of this impeachment.

The Committee is scheduled to meet on September 20 to consider its report on the questions submitted to it. Your memoranda should be submitted to the Committee by close of business September 6. Upon receipt of your memoranda, the Committee will decide whether to hold a hearing before its September 20 meeting. You will be advised as soon as possible as to the date of such a hearing should the Committee determine to have one.

Your assistance to the Committee will be greatly appreciated.

Sincerely,

Ted Stevens
Ranking Minority Member

Wendell H. Ford
Chairman

next Senator in point of seniority, Mr. PROXMIRE.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. THURMOND. Mr. President, I will now administer the oath to the President pro tempore of the Senate, Senator JOHN C. STENNIS.

Senator STENNIS, if you will raise your right hand: You do solemnly swear that in all things appertaining to the trial of the impeachment of Alcee L. Hastings, judge of the United States District Court for the Southern District of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God?

Mr. STENNIS. I do.

(Mr. SANFORD assumed the chair.)

Mr. STENNIS. Senator PROXMIRE, you do solemnly swear that in all things appertaining to the trial of the impeachment of Alcee L. Hastings, judge of the U.S. District Court for the Southern District of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

Mr. PROXMIRE. I do.

(Mr. PROXMIRE assumed the chair.)

Mr. BYRD. Mr. President, the oath shall now be administered by the Presiding Officer to all Senators. If any Senator has cause to be excused from this service, now is the appropriate time to make that known. If there is no Senator who desires to be excused, I move that the Presiding Officer administer the oath to the Senators.

The PRESIDING OFFICER (Mr. PROXMIRE). Is there objection? The Chair hears none. It is so ordered.

Senators shall now be sworn: You do solemnly swear that in all things appertaining to the trial of the impeachment of Alcee L. Hastings, judge of the U.S. District Court for the Southern District of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

SENATORS. I do.

The PRESIDING OFFICER. Any Senator who was not in the Senate Chamber at the time the oath was administered to the other Senators will make the fact known to the Chair so that the oath may be administered as soon as possible to the Senator.

Mr. BYRD. The Secretary will note the names of the Senators who have been sworn, and will present to them for signing a book which will be the Senate's permanent record of the administration of the oath.

Mr. President, the next step is to issue a summons to Judge Hastings which directs him to answer the articles of impeachment and to abide by and obey the further orders, directions, and judgments of the Senate. The Sergeant at Arms will serve the summons on Judge Hastings. In accordance with prior practice, the managers on the part of the House will have the opportunity to file a replication to the answer. Accordingly, on behalf of myself and the distinguished minority leader, Mr. DOLE, I send to the desk a resolution for the issuance of a summons with respect to the articles of impeachment against Alcee L. Hastings, and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the resolution.

The assistant legislative clerk read as follows:

S. RES. 456

A resolution to provide for issuance of a summons and for related procedures concerning the articles of impeachment against Alcee L. Hastings

Resolved, A summons shall be issued which commands Alcee L. Hastings to file with the Secretary of the Senate an answer to the articles of impeachment no later than September 8, 1988, and thereafter to abide by, obey, and perform such orders, directions, and judgments as the Senate shall make in the premises, according to the Constitution and laws of the United States.

SEC. 2. The Sergeant at Arms is authorized to utilize the services of the Deputy Sergeant at Arms or another employee of the Senate in serving the summons.

SEC. 3. The Secretary shall notify the House of Representatives of the filing of the answer and shall provide a copy of the answer to the House.

SEC. 4. The Managers on the part of the House may file with the Secretary of the Senate a replication no later than September 23, 1988.

SEC. 5. The Secretary shall notify counsel for Alcee L. Hastings of the filing of a replication, and shall provide counsel with a copy.

SEC. 6. The Secretary shall provide the answer and the replication, if any, to the Presiding Officer of the Senate on the first day the Senate is in session after the Secretary receives them, and the Presiding Officer shall cause the answer and replication, if any, to be printed in the Senate Journal and in the Congressional Record. If a timely answer has not been filed the Presiding Officer shall cause a plea of not guilty to be entered.

SEC. 7. The provisions of this resolution shall govern notwithstanding any provisions to the contrary in the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.

SEC. 8. The Secretary shall notify the House of Representatives of this resolution.

The PRESIDING OFFICER. The question is on agreeing to the resolution.

The resolution (S. Res. 456) was agreed to.

Mr. BYRD. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. DOLE. I move to lay that motion on the table.

Mr. BYRD. Mr. President, the question whether Judge Alcee L. Hastings engaged in impeachable conduct was the subject of consideration in the judicial branch for 4 years from the time that complaints were filed by several of Judge Hastings' fellow judges in March 1983. The judicial branch concluded its proceedings in March 1987, when Chief Justice William Rehnquist transmitted to the Speaker of the House of Representatives a certification that Judge Hastings had "engaged in conduct which might constitute one or more grounds for impeachment." Following the Chief Justice's certification to the House in March 1987, the House of Representatives studied this matter in subcommittee and full committee, and then voted on the articles of impeachment last week.

It is now the Senate's responsibility to render a verdict on the 17 articles of impeachment that are now before us. In fairness to both the House of Representatives and Judge Hastings, we should not attempt to complete the trial of this impeachment in the few weeks that remain before the adjournment sine die of this Congress.

There is historical precedent for the Senate's carrying an impeachment over from one Congress to the next. This was done in 1933 in the impeachment of Judge Louderback. The question of doing so, however, has never been the subject of a report by a committee to the Senate. In addition to advice on that subject, the Senate would benefit from a recommendation on the appropriate use in this impeachment of an evidentiary committee under Senate Impeachment Rule XI to help prepare for the Senate's taking up of the articles early in the next Congress.

Accordingly, on behalf of myself and the distinguished minority leader, Mr. DOLE, I ask unanimous consent that the Committee on Rules and Administration shall report to the Senate by September 23, 1988, on (a) the authority of the Senate to continue in the next Congress proceedings on the impeachment of Judge Alcee L. Hastings; (b) the appropriate use, in the pending impeachment, of Senate Impeachment Rule XI; and (c) any other matter which may assist the Senate in a fair trial of the pending impeachment.

The PRESIDING OFFICER. Is there objection? The Chair hears none. It is so ordered.

The Senate will take further appropriate order and notify the House of Representatives and counsel for Judge Hastings.

Mr. BYRD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. SANFORD). Without objection, it is so ordered.

ORDER OF PROCEDURE

Mr. BYRD. Mr. President, Senator DOLE and I have been talking and he is waiting further word in relation to the Contra aid amendment. I believe it would be a good use of the time for the moment to proceed with the ocean dumping bill and maybe that within a few minutes we could have an under-

WENDELL H FORD KENTUCKY CHAIRMAN
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GAIL S MARTIN CHIEF CLERK
WAYNE A SCHLEY REPUBLICAN STAFF DIRECTOR

United States Senate
COMMITTEE ON
RULES AND ADMINISTRATION
WASHINGTON, DC 20510-6325

September 8, 1988

Alan Baron, Esq.
Special Counsel for Managers
Judiciary Committee
U.S. House of Representatives
House Annex 2 - 361
Washington, D.C. 20515

Professor Terence J. Anderson
The University of Miami
School of Law
Coral Gables, Florida 33124

Dear Mr. Baron and Professor Anderson:

Thank you for your comments regarding the subjects on which this Committee has been directed to submit a report to the Senate. Your views will be helpful to the Committee in its consideration of this report.

We would welcome additional comments from each of you in response to those that have been submitted by opposing counsel. Please feel free to make whatever comments you wish to make in response to each other's statements. In particular, however, we would find helpful:

(a) Judge Hastings' views on the House Managers' statements regarding bifurcation of the Senate trial process (Page 8), and their suggestions regarding methods of assuring that Members are kept informed during proceedings of a Rule XI committee (Page 9); and

(b) the House Managers' comments on Judge Hastings' second statement in favor of a full Senate trial (Pages 7-14, Rule XI memorandum), and his suggestion regarding pre-trial discovery (Pages 7-8, procedure memorandum).

The Committee would further request that you submit comments on each other's positions on what legitimately can be done by the Senate in this proceeding between now and the convening of the next Congress.

Also, we would appreciate any additional statements Judge Hastings may find he can make regarding witnesses on his behalf in light of the statements made by House Managers on that subject.

Would you please deliver your additional comments, in print ready format, to the Committee by close of business, Tuesday, September 13, 1988, so that they may be included in the Committee's report.

Your assistance to the Committee will be greatly appreciated.

Sincerely,

Ted Stevens
Ranking Minority Member

Wendell H. Ford
Chairman

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